REVIEW OF AIRLINE DEREGULATION AND SUNSET OF THE CIVIL AERONAUTICS BOARD

(Organization and Procedures To Be Followed by the Department of Transportation in Administering Its Responsibilities After Sunset of the Civil Aeronautics Board)

(98–41)

HEARINGS

BEFORE THE

SUBCOMMITTEE ON AVIATION

OF THE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

SECOND SESSION

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CONTENTS

Proceedings of: Page

February 29, 1984 1

March 1, 1984 181

TESTIMONY

Dole, Hon. Elizabeth H., Secretary, Department of Transportation; accompanied by Matt Scocozza, Assistant Secretary for Policy; and Jim Marquez, General Counsel 76

Flynn, John B., Air Transport Adviser, and Former Senior Aviation Adviser to the Assistant Secretary for Policy and International Affairs, Office of Air Transportation, Department of Transportation 174

Hitchcock, Cornish F., Legal Director, Aviation Consumer Action Project .. 209

McKinnon, Hon. Dan, Chairman, Civil Aeronautics Board; accompanied by John Coleman, Director, Bureau of Domestic Aviation; and Dick Dyson, Associate General Counsel 144

SUBMISSIONS FOR THE RECORD

Dole, Hon. Elizabeth H., Secretary of Transportation:

Statement 6

"Civil Aeronautics Board Sunset—DOT plan", February 1984 18

Opinion of the General Counsel, "Impact of 'Sunset' on certain CAB functions", January 26, 1984 94

Flynn, John B., Air Transport Adviser, and Former Senior Aviation Adviser to the Assistant Secretary for Policy and International Affairs, Office of Air Transportation, Department of Transportation, statement .. 170

McKinnon, Hon. Dan, Chairman, Civil Aeronautics Board:

Statement 129

Reduction in Budget and Sunset Employment Figures since 1980, chart 154

Hitchcock, Cornish F., Legal Director, Aviation Consumer Action Project:

Statement 182

Statement before U.S. Department of Transportation on recommendations for DOT procedures to perform international aviation functions, dated January 31, 1983 188

ADDITION TO THE RECORD

Engle, Gertrude, American Health Education Foundation, letter 221

REVIEW OF AIRLINE DEREGULATION AND SUNSET OF THE CIVIL AERONAUTICS BOARD

(Organization and Procedures To Be Followed by the Department of Transportation in Administering Its New Responsibilities After Sunset of the Civil Aeronautics Board)

WEDNESDAY, FEBRUARY 29, 1983

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON AVIATION,
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2154, Rayburn House Office Building, Hon. Norman Y. Mineta (chairman of the subcommittee) presiding.

Mr. MINETA. The Subcommittee on Aviation will please come to order. It has been more than 5 years since Congress enacted the Airline Deregulation Act of 1978. That act has governed and continues to govern the transition of the airline industry into a largely deregulated environment. Under that act, the Civil Aeronautics Board will cease to exist at the end of this year. And most of its remaining functions will then transfer by law to other agencies. This subcommittee has been reviewing the issues surrounding deregulation in hearings which began last May. We are now approaching the conclusion of those hearings, and will soon be introducing and marking up legislation.

The Department of Transportation last December went to the Cabinet Council and proposed that there should be no further legislation to complete the transition process. The Cabinet Council after examination and expert legal review, the thoroughness of which we can only guess at, endorsed the Department's position that there should be no bill. That is now the administration position.

The Department has more recently set forth its plan in book form, which is generally available. For those of you that came in on this argument late, the Department is arguing that we in Congress were so infallible that in 1978, and even 5 years later, our original work is so flawless that not even the smallest changes are warranted. We are somewhat more modest and believe that there are a few loose ends that should be nailed down legislatively before the end of the year—minor things like all consumer protection authorities.

We also believe that Secretary Dole and her Department do such a fine job that they should receive more authority than they would without legislation. Such authorities as consumer protection, unfair com-

petitive practices, and antitrust immunity. Now the Secretary modestly insists that she does not aspire to those responsibilities. So we seem to have an ironic case of competing modesties. The DOT plan addresses a number of issues, some of which we will cover today and tomorrow. And others we will cover in hearings on the 13th and 14th of March.

Generally, today we will address issues of how DOT will handle authorities it gets in any event. Questions of organizational structure, procedure and staffing will be discussed today and tomorrow. Issues of which authorities should or should not go to DOT or other agencies in some cases, and how that should be accomplished will be dealt with on the 13th and the 14th of March.

That discussion will include, for example, questions of how the DOT legal analysis can argue that FTC would exert consumer protection and unfair competitive practice authority over airlines in the face of an express statutory prohibition against their doing so. Of that analysis it could be said that not since Christ walked on the water has so much been supported by so little, but that's a subject for our next hearing. [Laughter.]

Today we are considering how the DOT will handle those CAB authorities they will handle in any event at the end of this year. Principally, the regulation of international aviation, the administration of the essential air service program and the assumption of the Board's authority to make determinations under the employee protection program.

Of particular concern are the Department's plans for its organization, structure and procedures in making aviation decisions, which may be worth substantial amounts of money to competing private parties. Now this concern applies, not just to international routes, but to EAS determinations and carrier selections, EPP findings of primary cause and so on. The critical point is what officials will make the final decisions in these cases? And to what extent will these officials be insulated from pressures to decide these cases on grounds other than aviation matters.

While perfect insulation is probably not possible, and presumably has never existed, the Congress has historically provided three basic features which insulated such decisionmakers, and the CAB is a perfect example.

First, Board members have tenure in office, and may be removed from office only for inefficiency, neglect of duty or malfeasance. This protection of tenure in office gives Board members the ability to withstand political and other pressures from high ranking members of the Government.

Second, the Board is a collegial body, which means that even if one member yields to political pressures, that member's votes can be counterbalanced by the vote of other Board members.

Finally, the entire Board is an independent agency with responsibilities which are mainly quasi-judicial in nature. And which are limited to one field aviation.

Now this contrasts with an executive branch agency whose high officials have responsibilities in many different areas, and who consider themselves political officials of an administration, which generally has an extensive legislative agenda. These structural features

make it much more likely that high ranking officials of an executive branch agency will be faced with the temptation to base aviation decisions on political considerations or on a legislative agenda extending well beyond aviation considerations.

The issue is whether the DOT proposals for administering the transferred functions need to adopt any of the protections against political influence which I have discussed. It should be emphasized that by raising these questions, we are not questioning the integrity of any current or prior DOT officials. The issue is one of developing an organizational structure which will furnish protection against political pressures for the indefinite future.

We are also concerned that DOT recognize the importance of these functions it is inheriting, and devote sufficient staffing resources to its new responsibilities to protect the interests of U.S. aviation.

It is noteworthy that staffing in these areas have been severely reduced. CAB staffing has dropped more than 800 shortly after the passage of the Deregulation Act to about 370 today. Even within the major CAB functions which are being continued beyond sunset, there has been a considerable decline in staffing at the CAB.

The number of CAB employees administering the Board's responsibilities in international aviation has been reduced by 23 percent in 4 years leading up to sunset. The number of employees administering the central air service program has been reduced by 38 percent.

Now, these are major responsibilities which have not diminished at all, and will not be diminished next year. The concept that staffing in these areas can sustain further cuts and we can still get the job done is one that raises my suspicions.

In short, our subject today is how will DOT organize, process and staff major aviation responsibilities it is about to receive from the Board, and do so in a manner which will best insure that this Nation's aviation interests are fully met.

At this time I'd like to call on our very distinguished colleague from Arkansas, Mr. Hammerschmidt.

Mr. HAMMERSCHMIDT. Thank you, Mr. Chairman. As my colleagues are well aware, the Airline Deregulation Act of 1978 is the keystone for regulatory reform of the airline industry. This legislation set the timetable for phasing out the statutory authority for economic regulation and for the sunset of the Civil Aeronautics Board.

Our hearings today and tomorrow will focus on the Department of Transportation's plan for carrying out those responsibilities and functions which will be transferred to DOT after the CAB sunsets on December 31, 1984, such as international aviation, the essential air service program and section 43(a), employee protection.

Although the 1978 act provided for the outright transfer of these functions to the DOT, many in the industry believe that the ultimate decisionmaking authority should be insulated from the normal political pressures to which the DOT Secretary is subjected.

One idea being discussed to accomplish this is the creation of a separate administration within DOT to handle these functions, headed by an administrator appointed by the President for a fixed term. Others have advocated that a special panel should be set up within DOT to relieve the Secretary of part or even all of the responsibility for making these decisions.

DOT has now made its own proposal to deal with these concerns. And of course we will examine this proposal in considerable detail as the hearings progress.

While the ADA did not specifically address what would happen to other CAB functions after sunset, such as domestic carrier fitness certification, consumer protection regulation and data collection. DOT has indicated that in its opinion, each of these functions can be transferred to the appropriate agency, perhaps without the need for further legislation.

Accordingly, the Department's plan is based not only on the clear provisions of existing law, but also on its interpretation of the law in those cases where ambiguities still remain.

I noticed in a fairly recent change by DOT that they now feel that if this committee concludes that legislation is necessary to clarify some aspects of the transfer of functions as set forth in the ADA, they would not be unalterably opposed, so long as the language is limited to perceived areas of ambiguity.

While the issue of whether or not to proceed with legislation is one that will be more fully explored at our next set of hearings, the DOT plan is nevertheless an important document, because it shows how the Department intends to implement its new responsibilities after sunset if further legislation is not adopted.

One area in which the Department's plan is silent however, is the number of CAB employees that will move over to DOT to carry out the transferring functions. I believe it is incumbent upon this committee to insure that a sufficient number of employees are transferred in each program, whether to DOT or other agencies, so that effective and efficient operation of these functions will not be jeopardized.

Hopefully the Department will be able to shed some additional light on its plan as far as the transfer of CAB personnel is concerned.

Mr. Chairman, I would like to join you this morning in welcoming our very distinguished Secretary who was up here at one of our other subcommittees yesterday morning. We appreciate her time and her being back here this morning.

I would also like to welcome the Chairman of the CAB, as well as the other witnesses who will be testifying during the next 2 days. I appreciate their taking the time to assist us in these most important deliberations, and look forward to an ongoing dialog prior to and during this very important transition.

Thank you, Mr. Chairman.

Mr. MINETA. Mr. Levitas?

Mr. LEVITAS. Thank you, Mr. Chairman. I welcome these hearings today, and look forward very much to testimony of Secretary Dole and Chairman McKinnon. I think they are important. I enjoyed your opening statement very much. But as one who participated in the writing of the sunset bill, I'm not as willing to acknowledge yet that it was fallible in any regard. And I'm prepared to stick on the principle of infalliablity at this point. Particularly with a person named John Paul on the same platform with me today. I think it would not be inappropriate. [Laughter.]

However, I do want to say this. I think these are important hearings. But as we look at the DOT plan and consider its elements, I think it's

fair to say that I share many of the concerns that the chairman has expressed.

I am not however, persuaded that this is the opportune to consider legislation. We need to look at the sunset mechanism, and where we're going to end up. But I don't think this is the time to open up the entire subject of deregulation for reconsideration.

And if this legislation would have the effect of doing that, then I would have serious reservations about proceeding along those lines.

I guess we will get the answers to those questions, however, Mr. Chairman, as these hearings proceed. And I look forward to the testimony that will be forthcoming.

Mr. MINETA. Thank you, Mr. Levitas. Mr. McEwen.

Mr. MCEWEN. Thank you, Mr. Chairman. I would only concur with the remarks of the chairman and distinguished members thus far, but do not want to pass up an opportunity to express again my appreciation for the excellent services the Secretary is making to the Nation and her experience in the past, and welcome her to our committee.

Mr. MINETA. Mr. Valentine?

Mr. VALETINE. I don't have any opening statement, Mr. Chairman. I have some questions. I would like to comment that the shaft of light that came from this window seemed to form a halo around the head of the distinguished former North Carolinian who is here to testify. [Laughter.]

Mr. MINETA. Mr. Petri.

Mr. PETRI. I just can't let the opportunity pass to say that I think there is a halo over the head of the Secretary. She's doing an excellent job for the people of our country. And I thank you for being here this morning to help us wrestle with the work of this committee.

Mr. MINETA. Let me welcome to our subcommittee the Honorable Elizabeth Hanford Dole, the Secretary of Transportation. Let me again express our thanks to you, Secretary Dole, for the outstanding job that you are doing in your position, and again, express our appreciation for your appearance here today.

I know that you had to juggle your schedule to do this. But as Mr. Hammerschmidt indicated, 2 days in a row, before the Committee on Public Works and Transportation has got to be more than any Secretary ought to endure.

But in any event, I do appreciate very much your work, as well as your appearance here before the subcommittee.

The full text of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

STATEMENT OF ELIZABETH H. DOLE, SECRETARY OF TRANSPORTATION, BEFORE THE SUBCOMMITTEE ON AVIATION OF THE HOUSE PUBLIC WORKS COMMITTEE, CONCERNING CAB SUNSET, February 29, 1984

CHAIRMAN MINETA AND MEMBERS OF THE SUBCOMMITTEE:

I am pleased to be here today to present the Department of Transportation's plan for carrying out Civil Aeronautics Board sunset and for administering CAB's functions after sunset.

Before describing our plans for sunset, I would like to emphasize what an important undertaking I believe this is. The Airline Deregulation Act that Congress enacted in 1978 was a milestone that signified the end of forty years of federal regulation -- and the beginning of a new era of airline independence and competition.

In the past six years, we have seen what a sound foundation the ADA laid for deregulation. Despite sweeping changes in federal economic oversight -- and the recent stress of an economic recession and the PATCO strike -- we have a highly competitive and fundamentally healthy industry. Consumers have many more airlines, more service, and a wide variety of fares to choose among.

As the changes evolved during this six-year period, there were a number of proposals to change and "improve" the Airline Deregulation Act. With the most minor exception, Congress wisely chose to stay with the legislation as enacted. I believe that is still the wisest course.

The Act's provisions for the future of CAB's regulatory functions are both adequate and correct. Most functions will transfer to other agencies under explicit provisions of the ADA. In our view the remaining functions which warrant continued federal oversight can be assumed by DOT and the Federal Trade Commission under existing authority.

It will come as no surprise to this Committee that our reluctance to propose or endorse legislation to clarify the ADA stems from a concern that any clarifying legislation could become the magnet for diverse amendments by special interests that could confuse or interfere with orderly sunset of the CAB. If, however, this Committee concludes that legislation is necessary to clarify some aspects of the transfer of functions as set forth in the ADA, I would not be unalterably opposed, so long as the language is limited to the perceived areas of ambiguity and simply affirms and clarifies the existing jurisdictional arrangement for sunset.

Let me summarize now the basic features of the CAB Sunset Plan that the Department issued two weeks ago:

(a) CAB's international aviation authority, the Essential Air Service Program, and employee protection determinations will transfer to DOT on January 1, 1985, as explicitly provided for in the Act.

(b) Also on January 1, 1985, CAB's antitrust functions will transfer

to the Department of Justice, and CAB's domestic airmail rate authority will transfer to the US Postal Service, as explicitly provided for in the Act.

(c) Other CAB functions -- domestic airline economic fitness certification, information and assistance to consumers, and airline data collection -- were not provided for by the Act, but DOT has ample authority under other legislation to assure continued airline fitness for safety purposes, to provide information and assistance to consumers, and to collect aviation data.

(d) CAB's domestic consumer protection authority will not transfer to DOT, but we believe that the Federal Trade Commission under its own authority would able to regulate air carriers involved in domestic transportation in all cases currently regulated by the CAB under its Section 411 authority, such as unfair advertising, baggage liability, bonding and escrow for charter operations, and the current rulemaking on computer reservation systems.

I am sure that you want to know about each of these functions in more detail, so let me discuss each of them in turn.

INTERNATIONAL AVIATION

CAB's international aviation functions will be incorporated into the Office of the Assistant Secretary for Policy and International Affairs, with legal support to be provided by the Office of the General Counsel. Both of these DOT Offices already have many years of experience in working with the CAB and the Department of State on international aviation matters, so I expect that this organizational arrangement will work quite well.

A great deal of concern has been expressed about how DOT will handle international route awards and whether the awards will be subjected to improper influence.

The process at DOT will retain most of the steps and safeguards that are now used at the CAB. In particular, contested carrier selection cases will continue to be heard in formal on-the-record proceedings before administrative law judges. The recommendations of the ALJ's, which currently go directly to the Board for a final decision, would under our plan be submitted to an experienced senior career official in DOT's Office of Policy and International Affairs, such as the current Deputy Assistant Secretary in the Policy Office. That career official would make the final decision.

Our plan also provides that the Secretary or the Assistant Secretary for Policy may review final decisions, but only on a discretionary basis and in a carefully limited way. The only actions we could take during this review would be to affirm the decision or remand it for further consideration -- and that would take place on the public record.

At every step in this process, the legal safeguards of the Administrative Procedure Act will apply -- including on-the-record decisionmaking, separation of functions, and prohibitions against ex parte contacts. Finally, the integrity of the process will be protected by the availability of judicial review.

I am confident that this process will provide more than enough assurance that carrier selections will receive the fullest and fairest possible consideration at DOT.

THE ESSENTIAL AIR SERVICE PROGRAM

I recognize the high value attached to the Essential Air Service program by Congress and the communities that receive subsidized service. We applaud the CAB's success in administering this program so that there is a fair balance between assuring adequate small community air service and holding down the subsidy costs borne by the federal taxpayer. It is a program, therefore, that we have every intention of transferring smoothly to DOT, without interruption or disruptive change.

For these reasons, our plan is to transfer the EAS program intact to DOT. Because of the program's sensitivity and its operational nature, it will not be incorporated into one of the existing elements of OST. It will be established as a new and separate office in the Office of the Secretary. We do not intend to change the basic procedures that have been developed and used in the EAS office at CAB. Also,

we expect that most decisions will be made within the EAS Office without a need for further review. However, I intend to delegate to the Assistant Secretary for Policy and International Affairs the right to review EAS decisions in order to ensure that there is full and adequate consideration in cases where problems arise.

EMPLOYEE PROTECTION

After sunset, DOT will assume responsibility for determining whether certain airline employee job losses are due primarily to the ADA, thereby making them eligible for federal compensation. While CAB has initiated formal hearings to make the first set of these determinations, it is likely that they will not reach the final decision stage before the responsibility has transferred to DOT.

Under our Plan, we will continue the formal hearing process for the proceedings already underway at CAB. Once the Administrative Law Judge has made a recommended finding, our decision process will parallel the process to be used for international carrier selections. That is, the ALJ's recommendation will be referred to the senior civil servant in the Office of the Assistant Secretary for Policy and International Affairs for a decision. After his decision, either the Assistant Secretary for Policy or the Secretary of Transportation will have the opportunity to review the decision and, if necessary, remand it for further consideration based upon a written, on-the-record statement of the need for reconsideration.

ANTITRUST

The ADA provides that CAB's antitrust authority will transfer to the Department of Justice. While there is some opinion that this responsibility should transfer to DOT instead, I must emphasize our belief that Justice is the right place for antitrust decisions. It is consistent with that Department's overall responsibility for antitrust policy. It is true that the ADA requires an assessment of transportation benefits for antitrust decisions, and DOT will continue its present policy of participating in cases which involve transportation policy considerations, as contemplated by the Act.

We have already been working with Justice to be responsive to two antitrust matters of concern to the airlines. First, we have agreed that we will avoid duplication of authority in international tariffs and rates. Justice will review and act upon the organic agreements of IATA, leaving consideration of fare and related matters to the Department of Transportation, as Congress clearly intended. Second, in the domestic arena, Justice will consider granting limited antitrust immunity to prevent treble damage recoveries where the conduct has been or is likely to be the object of vexatious antitrust litigation.

I believe that as a result of the agreements that have been reached in these two areas, the airlines and others are becoming more comfortable with DOJ exercise of the antitrust function.

FITNESS

Currently, U.S. airlines must meet two types of fitness requirements in order to operate in the U.S.:

(a) They must meet the strenuous safety standards of the FAA in order to receive safety fitness certification, under Section 604 of the FAAct.

(b) They must meet the financial and managerial fitness standards of the CAB in order to receive economic fitness certification under Sections 401 and 419 of the FAAct.

After sunset, all fitness authority that has any bearing upon safety will continue to be administered by the FAA. FAA will continue to require airlines to meet the highest standards of safety.

Economic fitness certification will change after sunset, however. This change will fulfill the ADA objective of deregulating the airlines and relying as much as possible upon the marketplace, rather than the federal government, to determine whether and how an airline can do business. The particular change in economic fitness certification that will occur at sunset is that carriers providing domestic service (other than commuter carriers specified in Section 419 of the FAAct) will no longer be subjected to a financial and managerial fitness review. These airlines will therefore be able to commence operations once they receive safety certification from the FAA.

34-015 O - 84 - 2

For international air service and for Section 419 commuter air carriers, the CAB authority to certify airlines' economic fitness will transfer to DOT, along with the relevant programs. We will exercise the international fitness authority with an eye to preventing economically unfit carriers from compromising U.S. interests in international air service, where entry is often limited by existing bilateral agreements. In our exercise of the Section 419 commuter fitness authority, we will assure that essential air service to small communities will not be compromised by economically unfit carriers. In all other respects, we intend to minimize the government role in economic fitness certification, consistent with the deregulatory spirit of the ADA.

DATA COLLECTION

The ADA also did not provide for the transfer of CAB's data collection authority under Sections 407 and 415 of the FAAct, except that authority for international and EAS data collection will be transferred to DOT. The CAB's data collection authority for non-EAS domestic air service expires upon sunset.

DOT has ample authority under other statutes, however, to collect whatever airline data we believe is necessary. We have been working with CAB for over a year to determine what data should be collected in the future. Significant strides have been made to eliminate unnecessary data collection and ensure that valuable data will continue to be collected after sunset.

CONSUMER PROTECTION

From my past experience -- with the FTC, with the White House Office of Consumer Affairs, and as assistant to the President for public liaison -- I have gained a keen appreciation for the importance of consumer protection. Our sunset plan contains several features that will ensure a continuing high level of responsiveness to consumer needs by the airline industry.

First, all CAB's consumer authority related to international aviation will transfer to DOT upon the sunset of the CAB. Second, for domestic air service, we believe that the authority to prevent unfair and deceptive trade practices by airlines will revert to the Federal Trade Commission. Third, we will establish a new Office of Consumer Affairs in DOT to receive and respond to airline consumer complaints and questions. Moreover, this new Office will be staffed to respond to all telephone and mail complaints regardless of whether the origin of the complaint is a domestic flight or an international flight. It is anticipated that the majority of inquiries can be handled routinely. To the extent, however, that a complaint raises significant issues of fact or law, the complaint will be directed to the appropriate enforcement office, whether in the DOT or the FTC.

DOT will act in concert with the FTC in exercising this consumer authority. We will assure that regulations and enforcement practices will be consistent for the different types of air service under our respective jurisdictions.

The question has been raised to us, "What happens to authority to issue smoking regulations for airlines?" Since the ADA does not provide for the transfer of the Section 404 "safe and adequate" authority upon which domestic smoking regulations are based, this authority will expire at the end of 1984.

I do not believe, however, that the absence of federal smoking regulations will be a problem. The majority of airline passengers regularly state a preference to be seated in a non-smoking area of the aircraft cabin and I am confident that the airlines will continue to honor this preference by maintaining separate areas for smokers and nonsmokers.

PERSONNEL AND STAFFING

I understand that the subcommittee also desires to consider personnel and staffing matters in this hearing. Our analysis of staffing needs after sunset is not yet completed. DOT is involved in ongoing discussions with the CAB regarding the staffing issue. We will continue to work to define our legitimate staffing needs. Our projections may benefit from a staffing study which OMB has requested from the CAB. In the meantime, we believe it would be premature to discuss the number of staff who will transfer.

CONCLUSION

In closing, I would like to make clear my position on the need for new legislation. Our legal analysis concludes that new legislation is not necessary because, under the ADA, all functions that are consistent with the deregulatory objectives of the Act can continue to be performed. If, however, this Committee wishes to enact legislation to clarify the transfer of functions, I am willing to consider such legislation on the merits. It is vitally important that any new legislation not alter the jurisdictional arrangements that are provided by the ADA.

I would be pleased to respond to your questions and comments.

U.S. Department of Transportation
Office of the Secretary

February 1984

Civil Aeronautics Board Sunset

DOT PLAN

CIVIL AERONAUTICS BOARD SUNSET

Department of Transportation Plan

A. INTRODUCTION

The Airline Deregulation Act of 1978 (ADA) set in motion the regulatory reform of the airline industry. Included in that process are the sunset of the Civil Aeronautics Board (CAB) and the transfer to other agencies, effective January 1, 1985, of continuing functions. Most of these functions will transfer to the Department of Transportation (DOT), with certain other functions transferring to the Department of Justice (DOJ) and the United States Postal Service (USPS). Upon CAB sunset, the Federal Trade Commission (FTC) will have authority to undertake domestic aviation consumer functions. The Administration believes that the ADA makes adequate provision for domestic and international aviation regulatory functions and that there is no need for additional legislation.

This document summarizes DOT's plan for carrying out those responsibilities which it will perform after sunset and outlines the functions to be performed by other agencies.

B. CAB FUNCTIONS TO BE PERFORMED BY DOT

Under the terms of the ADA, the following CAB functions will transfer to DOT:

1. International aviation, including participation in bilateral negotiations, selection of U. S. carriers to serve on international routes, granting foreign air carriers authority to serve the United States, regulation of international fares and rates, action on unfair or discriminatory practices complaints in foreign air transportation, regulation of unfair or deceptive practices in foreign air transportation, and regulation of international air mail rates.

2. The Essential Air Service Program, a 10-year subsidy program, expiring October 1988, which guarantees a minimum level of air service to all communities that had certificated air carrier service when the ADA was enacted, and to certain other communities.

3. Section 43(a) employee protection, i.e., determination of whether the termination of airline employees is due primarily to deregulation, thereby making them eligible for certain federal financial benefits.

DOT will perform the following additional functions based on its existing statutory authority and the legislative history of the ADA:

4. Provision of aviation consumer information and assistance.

5. Collection of airline industry data.

6. Certification of the fitness of airlines providing domestic air transportation.

C. CAB FUNCTIONS TO BE PERFORMED BY OTHER AGENCIES

CAB functions that will be performed by agencies other than DOT are:

1. Regulation of unfair or deceptive practices in domestic air carrier service will be performed by the FTC upon CAB sunset, without new legislation.

2. Approval and granting of antitrust immunity for intercarrier agreements and airline mergers will transfer to DOJ.

3. Establishment of rates for domestic mail will transfer to the USPS.

D. ORGANIZATION OF MAJOR FUNCTIONS AT DOT

The Secretary will delegate responsibilities for those functions to be performed by DOT as follows:

1. International aviation functions, Section 43(a) labor determinations, and economic analysis of the airline industry will be performed by the Office of the Assistant Secretary for Policy and International Affairs.

2. The Essential Air Service (EAS) Program will be carried out within a new Office of EAS to be established in the Office of the Secretary.

3. A new Office of Hearings will be established in the Office of the General Counsel or the Office of the Assistant Secretary for Administration and be staffed by administrative law judges who will conduct all formal hearing cases.

4. DOT's Research and Special Programs Administration (RSPA) will collect and disseminate airline data. International aviation data collection and dissemination functions will be performed in conjunction with the Office of the Assistant Secretary for Policy and International Affairs.

5. Aviation consumer information and assistance responsibility will be incorporated into DOT's Office of the Assistant Secretary for Governmental Affairs.

6. Domestic fitness determinations will be incorporated into the fitness determinations made by DOT's Federal Aviation Administration (FAA).

5-6

7. Administrative and budgetary support for the functions to be performed by DOT will be provided by the Office of the Assistant Secretary for Administration and the Office of the Assistant Secretary for Budget and Programs, respectively.

E. REVIEW AND REVISION OF CAB PROCEDURAL REGULATIONS

Portions of the Board's procedural regulations must be modified by January 1, 1985. The Department has initiated a review of those regulations. Proposed revisions will be published in June 1984. A comment period of 60 days will follow. The final rules will be published in November 1984, and will take effect on January 1, 1985.

F. DETAILS OF THE PLAN

The following sections explain DOT's plan in greater detail.

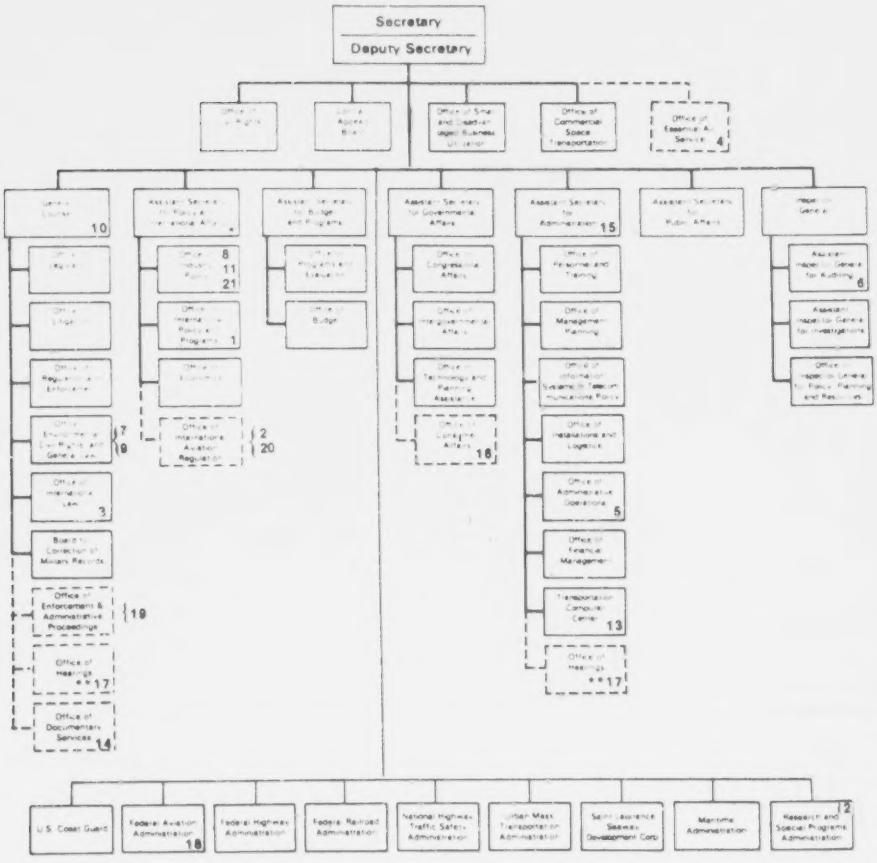
Section II, entitled "Allocation of Responsibilities," describes how CAB functions will be carried out by DOT offices. Detailed organization charts illustrate the arrangements for each office.

Section III, entitled "Other Agencies" summarizes CAB functions that will be carried out by DOJ and USPS. The FTC's role in regulating unfair or deceptive practices is treated in Section IV.

Section IV consists of a "Legal Analysis" of the impact of Sunset on certain CAB functions.

U.S. DEPARTMENT OF TRANSPORTATION

(Numbers below correspond to functional areas of responsibility to be performed by DOT. See next page for explanation.)


Secretary
Deputy Secretary
Office of Commercial Space Transportation
Office of Essential Air Service 4
General Counsel 10
Assistant Secretary for Budget and Programs
Assistant Secretary for Governmental Affairs
Assistant Secretary for Administration 15
Assistant Secretary for Public Affairs
Inspector General
Office of Legislative Affairs 16
Office of Personnel and Training
Office of Management Planning
Office of Administrative Operations 5
Office of Finance Management
Transportation Computer Center 13
Assistant Inspector General for Auditing 6
Office of Budget
Office of Hearings ** 17
Office of Documentary Services 14
Board for Correction of Military Records
U.S. Coast Guard
Federal Aviation Administration 18
Federal Highway Administration
Federal Railroad Administration
National Highway Traffic Safety Administration
Urban Mass Transportation Administration
Saint Lawrence Seaway Development Corp.
Maritime Administration
Research and Special Programs Administration 12

* Review Authority delegated by the Secretary

** Tentative

8

SUMMARY AND ORGANIZATION OF
CAB FUNCTIONS IN DOT

FUNCTION	ORGANIZATION
International Aviation	
Negotiations and Policy Analysis (1)	Assistant Secretary for Policy and International Affairs
Fares, Rates and Tariffs, Regulatory Affairs (including mail rates), Unfair or Deceptive Practices, and Fitness (2)	Assistant Secretary for Policy and International Affairs
Legal Analysis (3)	General Counsel
Essential Air Service	
Service Level, Subsidy Level, Fitness, and Carrier Selection (4)	Office of Essential Air Service
Subsidy Payment Processing (5)	Assistant Secretary for Administration
Audits (6)	Inspector General
Legal Analysis (7)	General Counsel
Employee Protection	
Policy Analysis (8)	Assistant Secretary for Policy and International Affairs
Legal Analysis (9)	General Counsel
General Legal Functions (10)	General Counsel
Industry Economic Analysis (11)	Assistant Secretary for Policy and International Affairs
Information Management (12)	Research and Special Programs Administration
Data Processing (13)	Assistant Secretary for Administration
Documentary Services (14)	General Counsel
Administrative Support and Management Planning (15)	Assistant Secretary for Administration
Consumer Information and Assistance (16)	Assistant Secretary for Governmental Affairs
Administrative Law Judges (17)	General Counsel* or Assistant Secretary for Administration*
Fitness Determinations for Domestic Air Service (Except EAS) (18)	Federal Aviation Administration

9

Public Advocacy Function	
Legal	
Litigation and Enforcement (19)	General Counsel **
Policy	
International Matters (20)	Assistant Secretary for Policy and International Affairs **
Domestic Matters (21)	Assistant Secretary for Policy and International Affairs **

* Tentative

** In performing the public advocacy function, the staffs of these offices will observe the Administrative Procedure Act's rules governing ex parte communications when they communicate with decisionmakers.

10

OFFICE OF THE ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS

Functions to be carried out by the Office of the Assistant Secretary for Policy and International Affairs after CAB sunset are:

International aviation functions which include, among others, bilateral negotiations, selection of U.S. carriers to serve on international routes, authorizations for foreign air carriers, review and approval of charter applications in foreign air transportation, international fares, rates, and tariff review, decisions on unfair or discriminatory competitive practices petitions in foreign air transportation, regulation of international air mail rates, and consumer protection and unfair or deceptive practices in foreign air transportation.

Section 43(a) employee protection, i.e., determination of whether the termination of airline employees is due primarily to deregulation, thereby making them eligible for certain federal financial benefits.

Economic analysis of the airline industry, i.e., the monitoring of current industry trends and problems and the analysis of the impact of regulatory policies on the airline industry.

These functions will be performed as follows: The Office of International Policy and Programs, which already participates in bilateral negotiations, will perform the functions of the Negotiations and Policy Analysis Division of the CAB's Bureau of International Aviation (BIA), including the function of advising the decisionmakers with respect to all international matters.

A new Office of International Aviation Regulation will be established to administer other international activities currently performed by BIA. This new office will consist of: (1) a Fares, Rates, and Tariffs Division which will analyze and act on proposed international fares, rates, (including postal rates) and tariffs; (2) a Regulatory Affairs Division which will review requests by airlines for new authority, ensure compliance with international route and charter authority, and assume responsibility for international unfair or deceptive practices. The Regulatory Affairs Division will also provide analysis and expert testimony on the record in formal hearings.

Responsibility for providing economic analysis of the airline industry will be in the Office of Industry Policy. This Office will also provide expert testimony as public counsel in formal hearings for employee protection determinations and for other domestic aviation issues for which formal hearings are instituted.

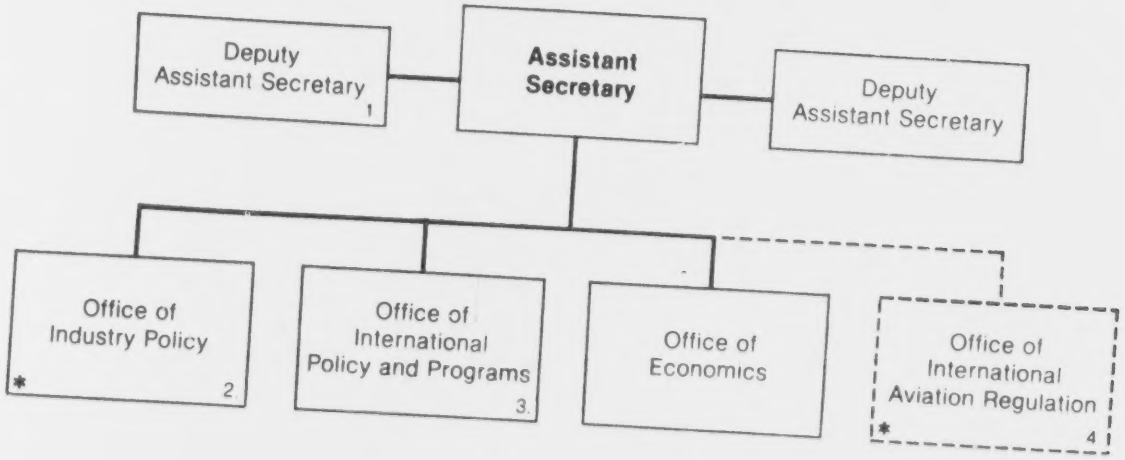
The Assistant Secretary for Policy and International Affairs, acting pursuant to authority delegated by the Secretary, will have the discretion to review and remand all formal hearing decisions involving employee protection, international carrier selection, unfair or deceptive practices, and unfair and discriminatory competitive practices petitions. Also, acting pursuant to authority delegated by

the Secretary, the Assistant Secretary for Policy and International Affairs will have the discretion to review EAS carrier selection, subsidy awards, and service level determinations. The Secretary, in her discretion, may exercise the review authority outlined above, in lieu of the Assistant Secretary, in all formal hearing cases and EAS cases.

During hearings cases when the Regulatory Affairs Division or the Office of Industry Policy are engaged in the role of public counsel, the staff involved will observe the "separation of function" requirements of the Administrative Procedure Act (APA) and will not participate or advise in the decisionmaking process except on the record.

34-015 O - 84 - 3

OFFICE OF THE ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS


Deputy Assistant Secretary 1
Assistant Secretary
Deputy Assistant Secretary
Office of Industry Policy * 2
Office of International Policy and Programs 3
Office of Economics
Office of International Aviation Regulation * 4

1. Decisionmaker in all cases involving a formal, quasi-judicial proceeding.
2. Provides analytical support in employee protection cases and airline industry economic analyses.
3. Performs international negotiations and other international aviation policy activities.
4. Reviews international fares and rates (including postal rates), tariffs, and route authority; and serves as public counsel in international carrier selection and unfair or deceptive practices cases.

* When serving as public counsel in formal hearing cases, the staffs of the Office of International Aviation Regulation and the Office of Industry Policy, will observe the separation of functions requirements of the Administrative Procedure Act (APA) and will not report to any person who participates in the decisionmaking process.

CARRIER SELECTION DECISIONMAKING AT DOT

The carrier selection process for foreign air transportation will be similar to that now used by CAB, i.e., a quasi-judicial process in which the requirements of the APA will apply, including separation of functions, on-the-record decisionmaking, and rules governing ex parte contacts. This process and the APA requirements will provide the optimal level of fairness and integrity in carrier selection decisions.

In hearing cases, the senior career official in the Office of the Assistant Secretary for Policy and International Affairs (currently the Deputy Assistant Secretary for Policy and International Affairs) will draft and issue an instituting order establishing the public goals, policies, and criteria for the proceeding. This will be done in consultation with the Offices of the General Counsel and the Assistant Secretary for Policy and International Affairs.

DOT staff will appear in such proceedings, as appropriate, in a "public counsel" role similar to that currently exercised by the CAB's Bureau of International Aviation. The DOT staff position will be jointly prepared for presentation to the Administrative Law Judge (ALJ) by the Office of the General Counsel's new Enforcement and Administrative Proceedings Office and the Office of the Assistant Secretary for Policy and International Affairs' new Regulatory Affairs Division. Public counsel, airlines, and other interested parties will present their positions to the ALJ. In each hearing case, an ALJ will conduct a formal, on-the-record hearing and issue a Recommended Decision regarding the carrier to be selected. This recommendation will be reviewed by the senior career official in the Office of the Assistant Secretary for Policy and International Affairs who will issue a decision.

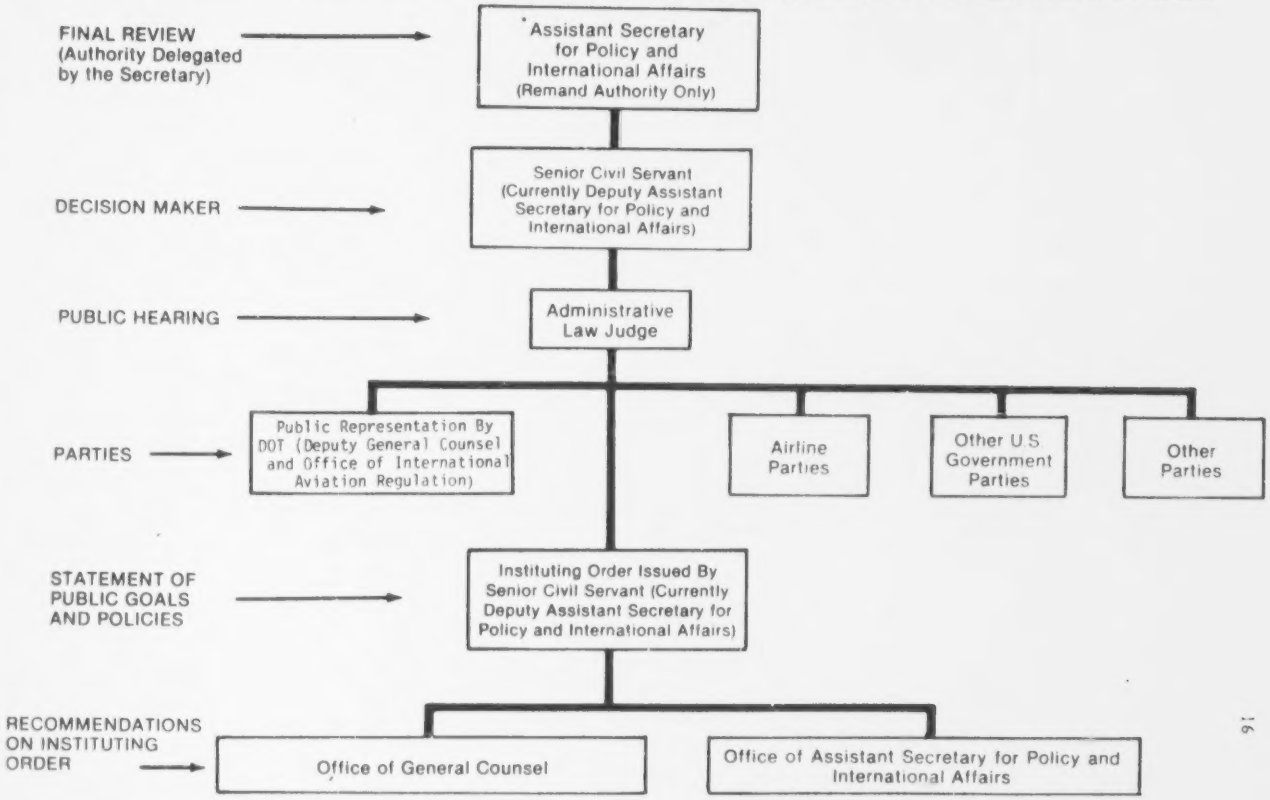
To ensure a separation of functions in carrier selection cases, all DOT staff performing the public counsel role will be functionally isolated from persons participating in the decisionmaking process and will not report to anyone involved in decisionmaking in connection with these proceedings. This separation will be maintained so as to meet fully the requirements of the APA and ensure the integrity of the on-the-record decisionmaking process.

The Assistant Secretary for Policy and International Affairs will have discretionary authority, delegated by the Secretary, to review each decision issued by the senior career official, but his action will be limited to approving the decision or remanding it for reconsideration. The Secretary, in her discretion, may exercise this review authority in lieu of the Assistant Secretary, subject to the same limitations.

Presidential review will continue to be limited, under Section 801 of the Federal Aviation Act (FA Act), to national security and foreign relations considerations. Judicial review will continue to be available to any party dissatisfied with the outcome of the decision, to the same extent as under present law.

Following is a chart showing the decision structure for international carrier selection cases.

DECISION STRUCTURE FOR INTERNATIONAL CARRIER SELECTION CASES



* The Secretary May Exercise This Review Authority In Lieu Of The Assistant Secretary For Policy And International Affairs

OFFICE OF THE GENERAL COUNSEL

Functions to be carried out by the Office of the General Counsel after CAB sunset are:

- International aviation functions which include providing legal advice to decisionmakers in the Office of the Assistant Secretary for Policy and International Affairs, including advice on the interpretation of the international obligations of the United States, in all international matters pending before the Department (such as carrier selection, unfair or discriminatory competitive practices petitions, unfair or deceptive practices, and exemption requests). A separate unit in the Office of the General Counsel will litigate hearing cases as public counsel and initiate enforcement proceedings.

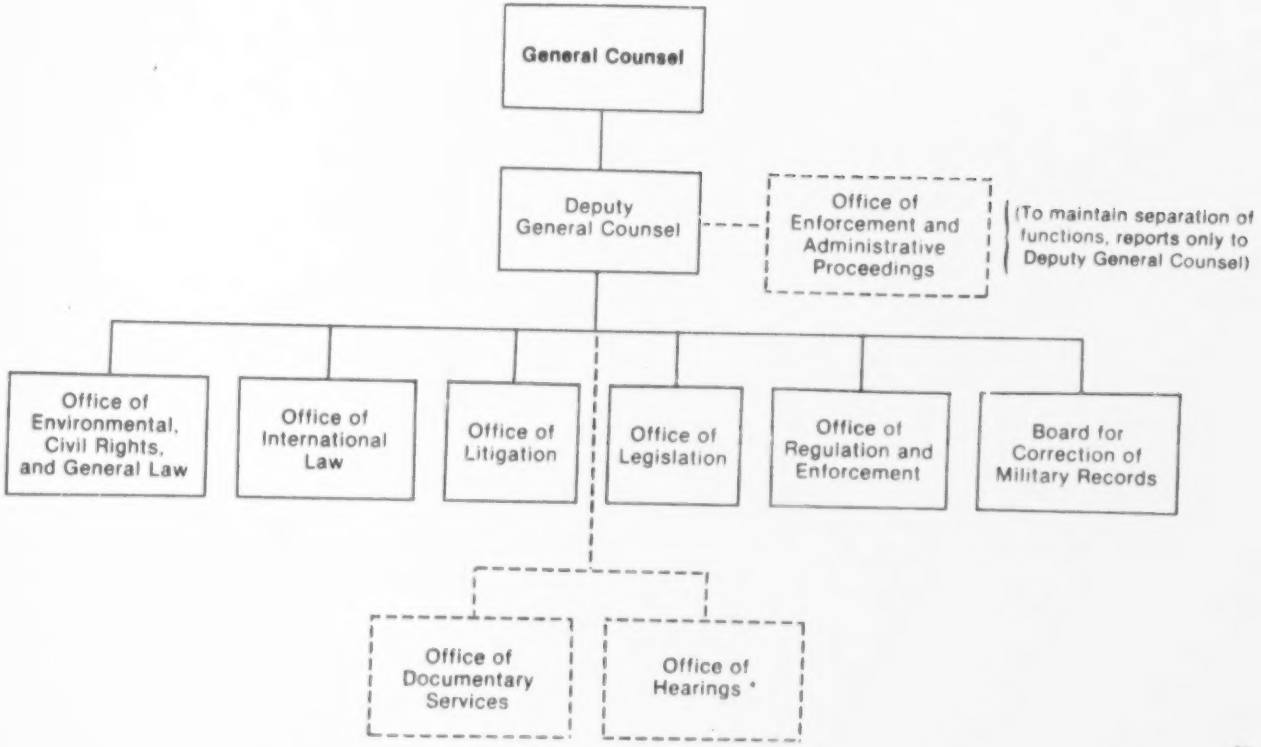
- Essential air service functions which include providing legal advice to decisionmakers in the Office of EAS, participating in hearings, and advising the Secretary and the Assistant Secretary for Policy and International Affairs.

- Employee protection functions which include advising the decisionmakers in the Office of the Assistant Secretary for Policy and International Affairs. A separate unit in the Office of the General Counsel will litigate hearing cases as public counsel.

The Office of International Law, which already participates in international negotiations and CAB proceedings on unfair or discriminatory competitive practices petitions, will assume the function of advising the decisionmakers on international legal matters. This office will also represent the views of the Department before DOJ on international antitrust matters. The Office of Environment, Civil Rights, and General Law will assume the function of providing legal advice in essential air service matters (including participating in community hearings and employee protection matters). A separate Office of Enforcement and Administrative Proceedings will be established, reporting to the Deputy General Counsel, to litigate as public counsel all formal hearing cases, and to conduct all enforcement proceedings. This Office and the Deputy General Counsel (currently a career official) will observe the separation of function requirements of the APA and will not participate or advise in the decisionmaking process except on the record.

The CAB Docket Section's functions will be carried out in a newly established Office of Documentary Services in the Office of the General Counsel. For administrative support purposes, an Office of Hearings, consisting of the Administrative Law Judges, will be assigned to either the Office of General Counsel or the Office of the Assistant Secretary for Administration.

OFFICE OF THE GENERAL COUNSEL

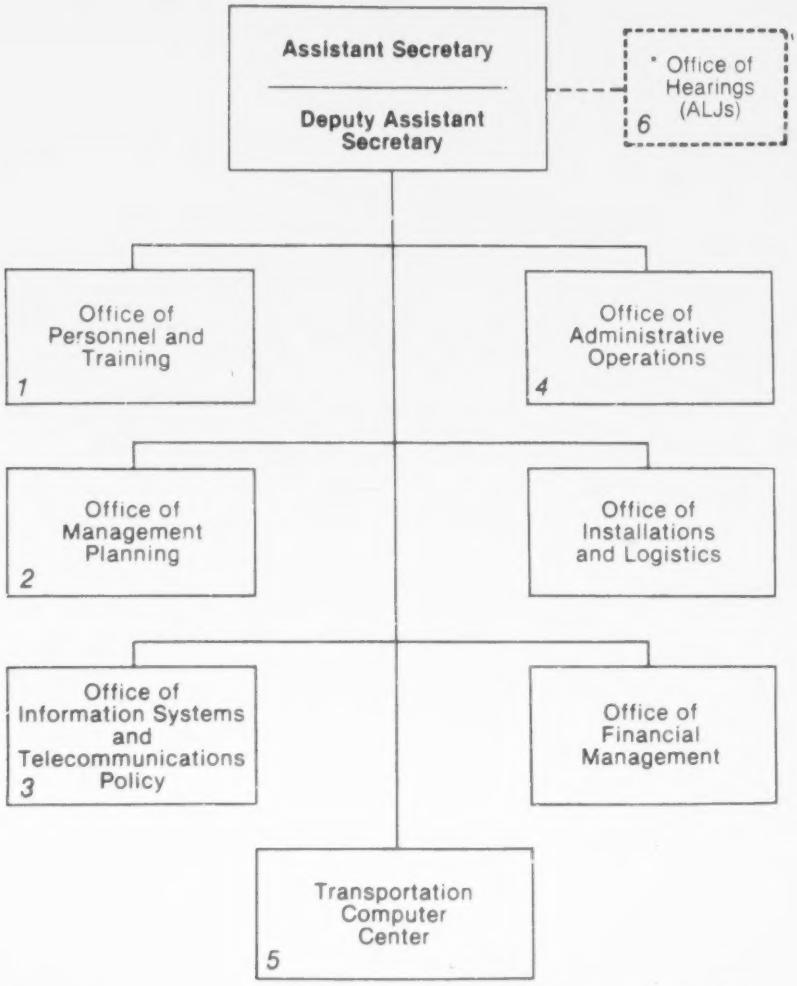

General Counsel
Deputy General Counsel
Office of Enforcement and Administrative Proceedings
(To maintain separation of functions, reports only to Deputy General Counsel)
Office of Environmental, Civil Rights, and General Law
Office of International Law
Office of Litigation
Office of Legislation
Office of Regulation and Enforcement
Board for Correction of Military Records
Office of Documentary Services
Office of Hearings *

* Tentative Location

OFFICE OF THE ASSISTANT SECRETARY FOR ADMINISTRATION

After CAB sunset, the Office of the Assistant Secretary for Administration will perform the additional function of processing EAS subsidy payments. For administrative support purposes, an Office of Hearings, consisting of Administrative Law Judges, will be assigned either to the Office of the General Counsel or the Office of the Assistant Secretary for Administration. Other CAB functions to be carried out by the Office of the Assistant Secretary for Administration are essentially general administrative functions, which are currently performed as part of normal DOT operations.

OFFICE OF THE ASSISTANT SECRETARY FOR ADMINISTRATION



1. Personnel Support
2. Management Planning, Review and Analysis
3. Reports and Data Collection Management

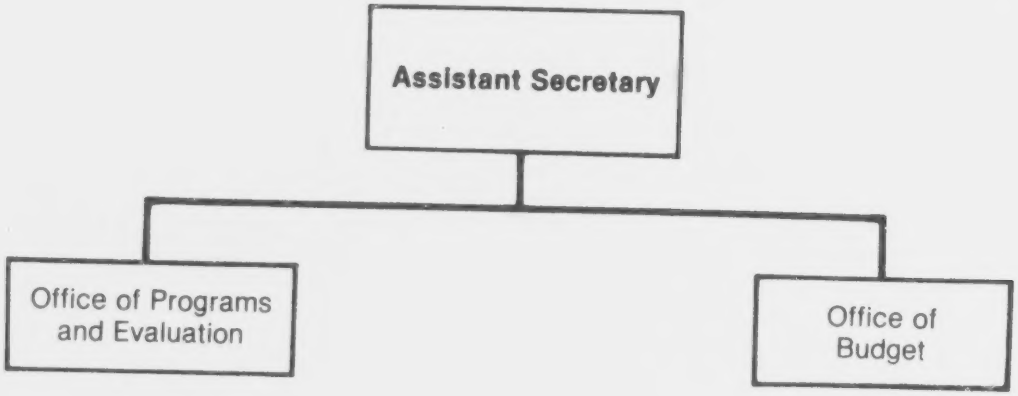
* Tentative Location

4. Payment of subsidy Claims (EAS)
   Procurement
   Accounting
   Printing
   Library
5. Computer Applications, development and operations
6. Formal Hearings

OFFICE OF THE ASSISTANT SECRETARY FOR BUDGET AND PROGRAMS

Functions to be carried out by the Office of the Assistant Secretary for Budget and Programs are the normal budget and review functions which are common to the Department as a whole. No new functions for this office will result from the addition of CAB activities at DOT.

OFFICE OF THE ASSISTANT SECRETARY FOR BUDGET AND PROGRAMS

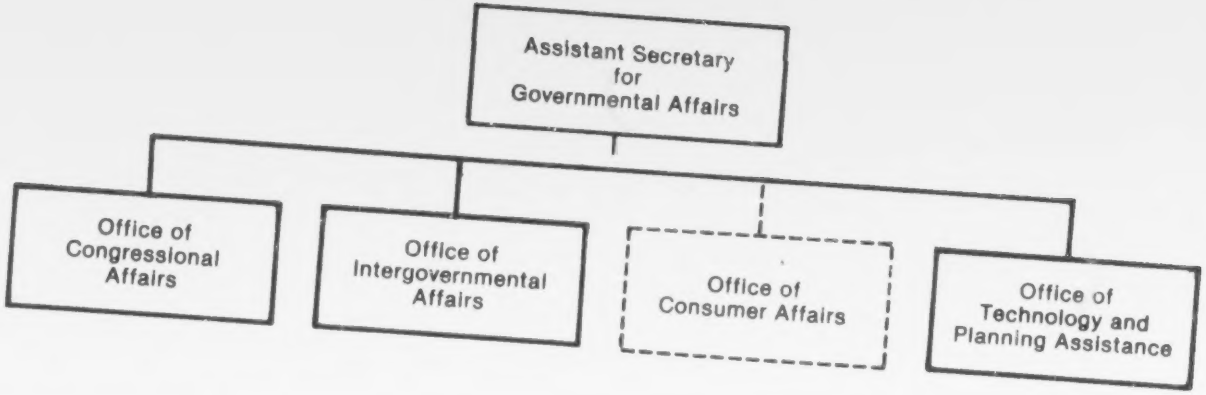


OFFICE OF THE ASSISTANT SECRETARY FOR GOVERNMENTAL AFFAIRS

Information and assistance functions will be carried out by the Office of the Assistant Secretary for Governmental Affairs after CAB sunset and will include assisting consumers in their dealings with the air transportation industry and assisting state and local organizations in handling airline consumer complaints.

A new Office of Consumer Affairs will be established to carry out these information and assistance functions. This new office will be located within the Office of the Assistant Secretary for Governmental Affairs, which already provides information to consumers through numerous publications, periodic reports, newsletters, and correspondence.

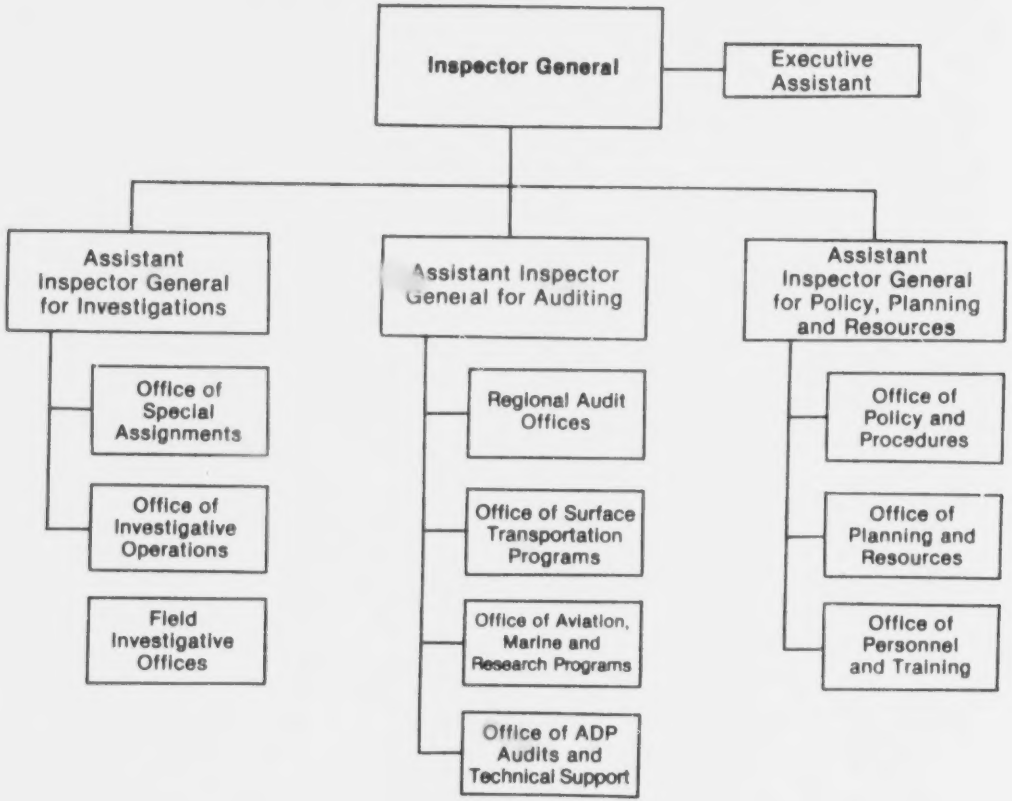
Office of The Assistant Secretary for Governmental Affairs


Assistant Secretary for Governmental Affairs
Office of Congressional Affairs
Office of Intergovernmental Affairs
Office of Consumer Affairs
Office of Technology and Planning Assistance

OFFICE OF THE INSPECTOR GENERAL

The Office of the Inspector General (OIG) will verify EAS subsidies, an audit function currently performed by the CAB's Bureau of Carrier Accounts and Audits. This function will be carried out within O!G's existing organizational structure.

OFFICE OF INSPECTOR GENERAL


Inspector General
Executive Assistant
Assistant Inspector General for Investigations
Office of Special Assignments
Office of Investigative Operations
Field Investigative Offices
Assistant Inspector General for Auditing
Regional Audit Offices
Office of Surface Transportation Programs
Office of Aviation, Marine and Research Programs
Office of ADP Audits and Technical Support
Assistant Inspector General for Policy, Planning and Resources
Office of Policy and Procedures
Office of Planning and Resources
Office of Personnel and Training

RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION

The Research and Special Programs Administration (RSPA) will carry out those functions currently performed by the CAB Information Management Division (IMD). IMD maintains systems for gathering and analyzing economic and operational data on international and domestic air transportation and disseminates the data to appropriate users within the government and the private sector. These functions, together with other transportation functions currently administered by RSPA, will be consolidated into a new Office of Information Management which will report directly to the Administrator.

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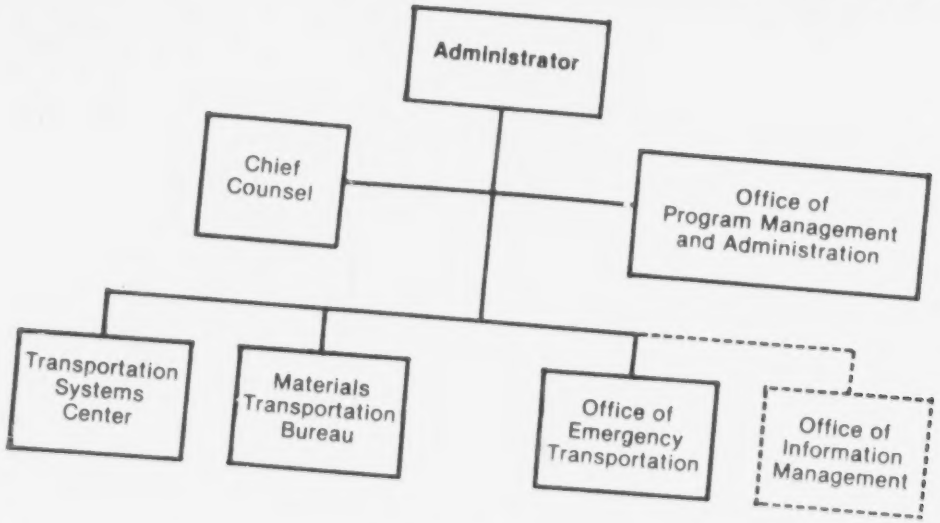
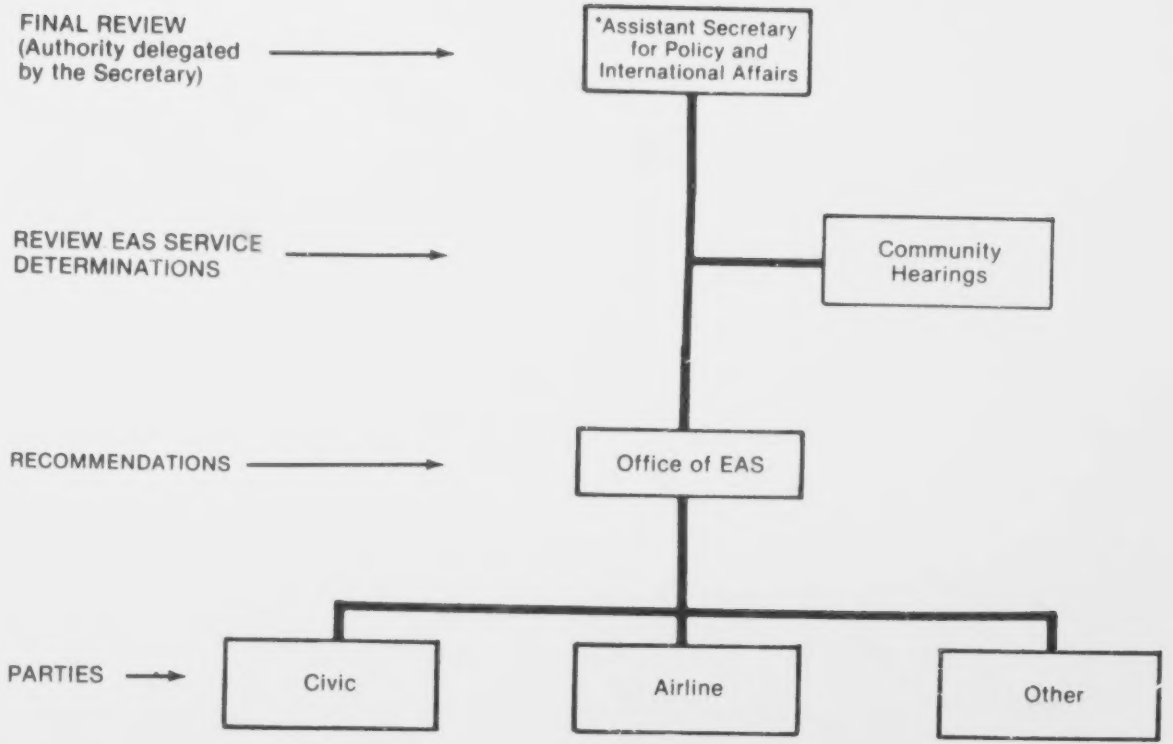
RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION



OFFICE OF ESSENTIAL AIR SERVICE

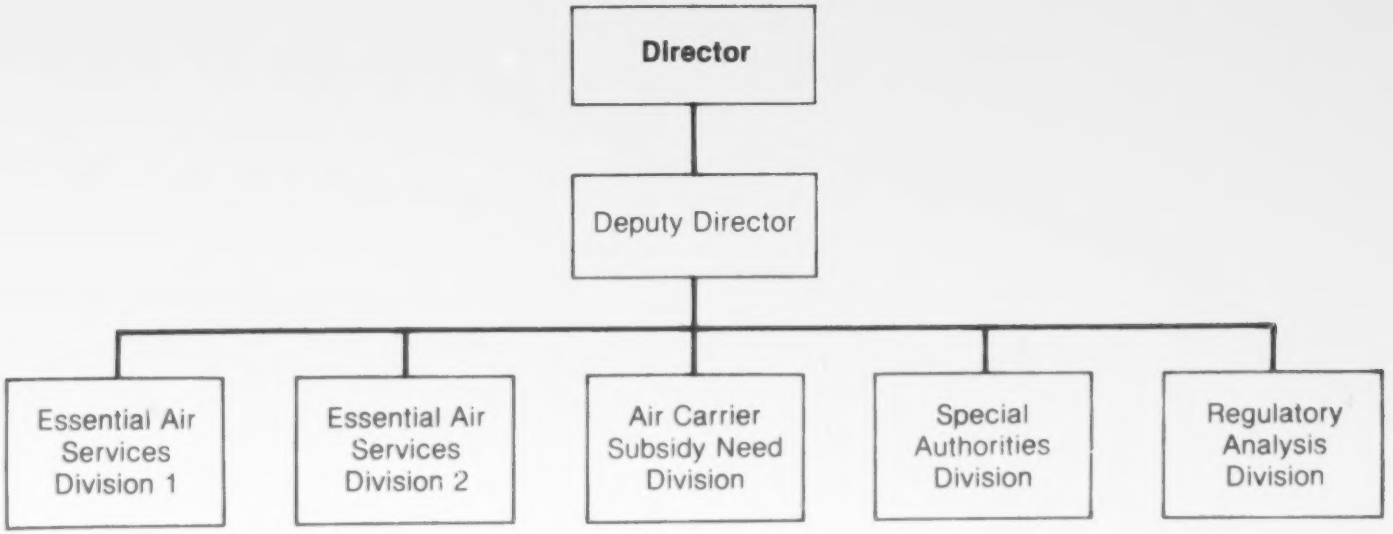
A new Office of Essential Air Service (EAS) will be established as a separate office within the Office of the Secretary to administer the EAS subsidy program. This new office will conduct rate negotiations with carriers, set subsidy and service levels, establish community EAS standards, process carrier selection cases, evaluate and monitor air carrier performance, and perform other related EAS functions currently carried out by the CAB. EAS community hearings, conducted by senior staff representatives from the Office of EAS, the Office of General Counsel, and the Office of the Assistant Secretary for Policy and International Affairs, will be instituted when necessary to consider appeals of essential air transportation service level determinations. The Assistant Secretary for Policy and International Affairs, acting pursuant to authority delegated by the Secretary, will have the discretion to review service level determinations as well as decisions on carrier selection and subsidy awards. The Secretary, in her discretion, may exercise this review authority in lieu of the Assistant Secretary.

DECISION STRUCTURE FOR EAS PROGRAM (SERVICE DETERMINATION)



* The Secretary May Exercise This Review Authority In Lieu Of The Assistant Secretary For Policy And International Affairs

OFFICE OF ESSENTIAL AIR SERVICE (EAS)



FUNCTIONS TO BE PERFORMED BY DEPARTMENT OF JUSTICE

The Attorney General will delegate, by regulation, final decisionmaking authority to the Assistant Attorney General, Antitrust Division, for all CAB antitrust functions. These include approval of, and antitrust immunity for, mergers, interlocking relationships, and intercarrier agreements.

The Assistant Attorney General has three Deputies. The Deputy responsible for regulated industries supervises the Transportation Section, which will be primarily responsible for the transferred CAB functions. That section, for example, will review all requests for approval of, and immunity for, intercarrier agreements and determine and recommend appropriate action to the Assistant Attorney General.

For on-the-record adjudicatory proceedings that may be required, such as contested mergers, the Transportation Section and its supervising Deputy will assume the responsibility for litigating the case. The Assistant Attorney General will rely on other resources within the Antitrust Division for advice and support in rendering a decision in those cases.

With respect to international air fares, DOT and DOJ have agreed that it would be inconsistent with the public interest and the intent of Congress in the ADA to permit an overlapping of jurisdiction. Accordingly, the Department of Justice will consider for approval only organic agreement matters and leave consideration of all fare matters in foreign air transportation to the Department of Transportation, as Congress clearly intended.

DOJ contemplates that proposed regulations implementing its authority will be published by June 1984, followed by a 60-day comment period, and that the final rule will be published in November 1984.

U.S. Department of Justice

Antitrust Division

35

Office of the Assistant Attorney General

Washington, D.C. 20530

ATTACHMENT TO THIS LETTER WAS REVISED AS OF FEBRUARY 10, 1984.

5 JAN 1984

Matthew Scocozza
Assistant Secretary for Policy
& International Affairs
Department of Transportation
400 7th Street, S.W.
Room 10228
Washington, D.C. 20590

Dear Mr. Scocozza:

As you know, the Departments of Justice and Transportation have commenced the necessary planning to facilitate an orderly transfer of functions from the Civil Aeronautics Board to our respective departments in accordance with the provisions set out in the Airline Deregulation Act. As part of that process, our two departments have discussed the manner in which certain of the transferred functions would be administered, particularly in the area of IATA fare agreements where, given the Department of Transportation's responsibility to oversee international fares directly and the Department of Justice's responsibility to oversee agreements, there arose a potential for overlapping jurisdiction.

In respect of the air fares matter, our two departments have already agreed that it would be inconsistent with the public interest and moreover, inconsistent with the intent of Congress in the Airline Deregulation Act, to permit an overlapping of jurisdiction. Accordingly, the Department of Justice has advised the Department of Transportation that it will no longer require as a condition for approval of IATA that fare agreements be submitted for approval. Instead, the Department of Justice will consider for approval only organic agreement matters, and leave consideration of all fare matters to the Department of Transportation, as Congress clearly intended.

We have reached other decisions concerning how we would administer certain transferred functions and I enclose herewith for your consideration a brief statement setting forth these decisions. As you know, we have been consulting with industry representatives concerning these matters and will continue to do so. To the extent you are asked questions about our views on these matters, you may certainly feel free to use this letter and attached paper to provide requested information.

As we continue to review implementation of CAB sunset, I will keep you informed of our progress and would hope you could keep us advised of yours, as you deem appropriate. I look forward to a continuation of our close cooperation in this effort.

Sincerely,

Douglas H. Ginsburg
Acting Assistant Attorney
General
Antitrust Division

Enclosure

Revised 2/10/84

37

PRESENT PLANS OF THE DEPARTMENT OF JUSTICE FOR TRANSITION OF RESPONSIBILITY UNDER SECTIONS 408, 409, 412 AND 414 OF THE FEDERAL AVIATION ACT

1. Section 408--Mergers

Under regulations to be drafted by the Department, most mergers and acquisitions will be processed under expedited procedures without a formal hearing. Mergers that raise significant competitive issues will be referred to hearings before administrative law judges detailed from the FTC, the Department of Transportation or other agencies. The procedures that will be followed in these hearings will be based on the procedural rules now used by the CAB. Antitrust Division attorneys will participate in such hearings and appeals of the ALJ decisions may be taken to the Assistant Attorney General in charge of the Antitrust Division. Accordingly, in cases where a hearing is held before an ALJ, the Assistant Attorney General will not have any involvement in the proceeding except to decide any appeals taken from the ALJ's decision. Applicants will be required to indicate in their applications whether or not they intend to accept the standard labor protective provisions.

2. Section 409--Interlocking Relationships

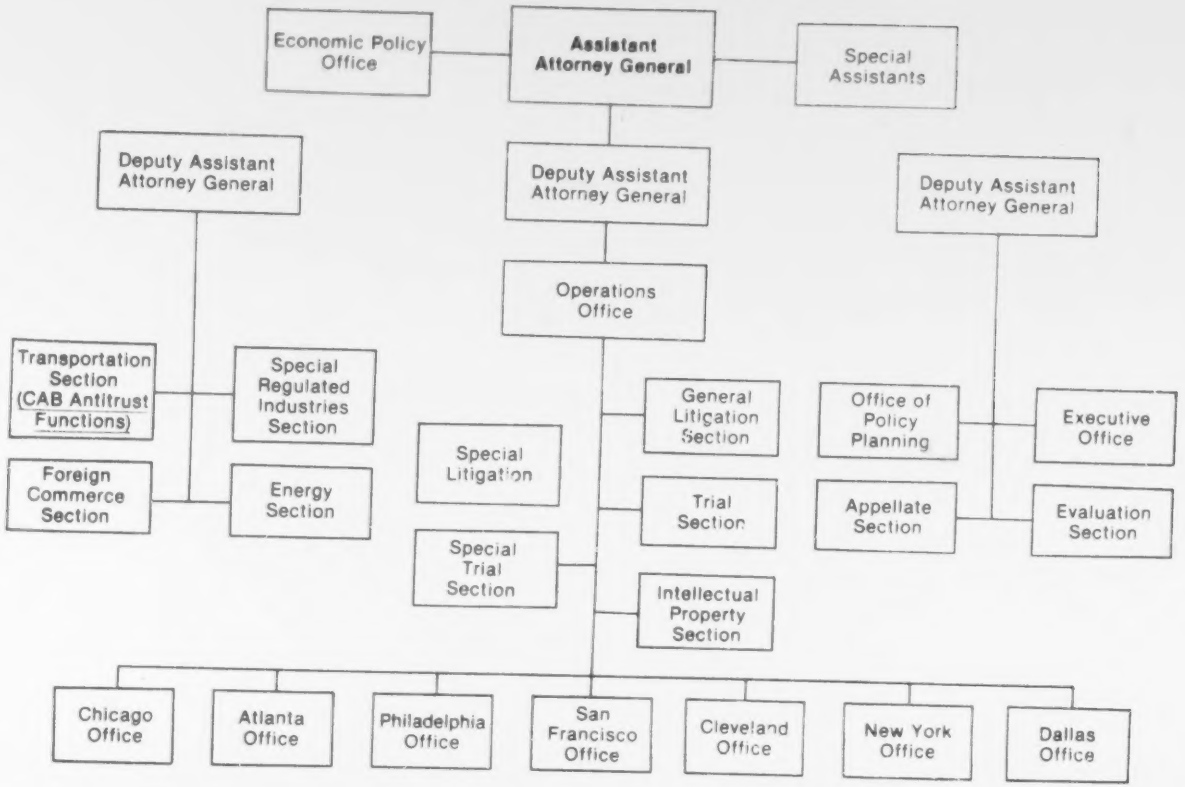
The Department's intention is to exempt all interlocking relationships from the requirements of Section 409. Interlocking relationships that raise competitive issues will be considered under Section 8 of the Clayton Act, 15 U.S.C. §19.

3. Sections 412 and 413--Agreements

The Department's present intention is to modify (or to petition the CAB to modify, effective January 1, 1985) the terms of the approval of the IATA agreement so that all authority to regulate international fares and rates will rest with DOT. Accordingly, only IATA's organic agreement, bylaws and amendments thereto will be subject to review by the DOJ. The Department of Justice will not, as a result, receive for approval from IATA any agreements modifying fares. Foreign fares will be reviewed and regulated directly, and exclusively, by DOT.

Because filing under Section 412 is optional, carriers will be encouraged not to file agreements that pertain to domestic aviation. In cases where such an agreement is filed and raises unsettled issues of antitrust law, the agreement will be granted immunity if its potential competitive disadvantages are outweighed by its social and economic benefits. Agreements that the Department concludes do not contravene the antitrust laws will be approved but will not be granted antitrust immunity except in those cases where the conduct has been or is likely to be the object of frivolous antitrust litigation. In such cases, the immunity granted by the Department may be limited so as to apply to treble damage actions only.

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION



FUNCTIONS TO BE PERFORMED BY THE UNITED STATES POSTAL SERVICE

The United States Postal Service (USPS) has consistently interpreted the Airline Deregulation Act of 1978 (ADA) as conferring upon it, effective January 1, 1985, complete authority to implement contracts for the transportation of mail via air between domestic points. USPS is confident it will be ready to exercise this new responsibility under the ADA.

During the past two years, USPS has intensified its exploration of how it will carry out this new responsibility. A special "CAB Sunset/Air Contracting" Task Force was established to make recommendations to the Postmaster General. These recommendations resulted in the adoption of two types of contract solicitations for domestic air mail transportation. The first type will be for guaranteed transportation, on certain high-density routes, within specified periods of time and volume parameters. The second type will be for "on demand" transportation on all routes after passengers and their baggage have been accommodated. Both types of contracts will be for two-year terms, and will include provisions for adjusting rates for economic changes. In developing these contracts, USPS held numerous meetings with the air carriers, at which air carrier concerns were resolved by revising the two contract solicitations.

On January 20, 1984, both solicitations were issued to any interested party, as well as to all known air carriers. A bidders' conference was held on January 30, 1984, to answer any further questions. Preliminary offers are currently due at USPS by April 2, 1984. Negotiations will be conducted between May and September of 1984. Contracts will be awarded in October and November of 1984, and service will commence on January 1, 1985.

To administer these contracts, USPS also has developed a computerized Contract Support System for its Airport Mail Facilities to weigh the mail, automatically generate a manifest, and assign the mail to a contract. In addition, the System will provide management data to monitor how well both USPS and the contractor adhere to their contract obligations. The System will be supported by state-of-the-art computer technology and will use preprinted bar coded tags for the mail bags or containers, laser scanning, electronic scales, and material handling integration. The first unit of the System will be operational in the Spring of 1984 with the last unit coming on line in October of 1984. This will allow for any last minute modification or adjustments, and all units will be completely tested long before service commences on January 1, 1985.

In accordance with its interpretation of the ADA, USPS assumes that the regulatory authority of CAB over international mail rates will be transferred to DOT on January 1, 1985.

U.S. Department of Transportation
Office of the Secretary of Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

OPINION OF THE GENERAL COUNSEL

IMPACT OF "SUNSET" ON CERTAIN CAB FUNCTIONS

This opinion examines Federal aviation and airline deregulation statutes to determine whether certain domestic air transportation functions of the Civil Aeronautics Board (CAB) -- which are neither explicitly terminated nor listed for transfer by the "Sunset Provisions" enacted by Congress in 1978 -- nonetheless transfer to the Department of Transportation (DOT) or other agencies rather than cease when the CAB terminates.

In particular, this opinion is concerned with four major functions currently performed by the CAB: section 401(d) domestic carrier "fitness" certification; section 404(a) "safe and adequate" service regulation; section 407 and 415 data collection; and section 411 "unfair trade practices" regulation.

For the reasons that follow, I have concluded that none of these functions transfer to DOT or any other agency as a result of the sunset provisions. However, I have also concluded that DOT and the Federal Trade Commission (FTC) will have sufficient authority to perform almost all of these functions under their existing statutes, so that no additional legislation will be needed to continue these functions once the CAB terminates.

I. TITLE XVI DOES NOT TRANSFER THE FOUR DOMESTIC FUNCTIONS

The functions of the CAB are set out in the Federal Aviation Act of 1958 ("the Act") [1/], as amended by the Airline Deregulation Act of 1978 [2/]. The sunset provisions, in Title XVI of the Act, provide for the progressive dismantling of the CAB and the functions it performs, commencing on October 24, 1978, and accelerating on December 31, 1981, and January 1, 1983. The process culminates on January 1, 1985, with the abolition of the CAB (by repeal of Title II of the Act) and the transfer of certain functions to other named agencies. See section 1601 of the Act.

International aspects of all CAB functions not abolished clearly transfer under section 1601(b)(1)(B) of the Act, and are not at issue in this opinion. The purely domestic aspect of certain other CAB functions contained in the Act are neither explicitly terminated nor transferred by Title XVI. Those domestic functions and the relevant statutory provisions are:

1/ Public Law 85-726, Aug. 23, 1958, as amended, 49 U.S.C. 1301 et seq.

2/ Public Law 95-504, October 24, 1978.

Fitness:

Section 401(d) of the Act provides, in part:

> "(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder . . . ."

Safe and Adequate Service:

Section 404(a)(1) of the Act (though repealed in large measure in 1981 and 1983) provides, in part:

> "It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers authorized to engage in scheduled air transportation by certificate or by exemption under Section 416(b)(3) of this title: to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers."

Data Collection:

Section 407 of the Act provides, in part:

> "(a) The Board is empowered to require annual . . . and special reports from any air carrier . . .; to prescribe the

> manner and form in which such reports shall be made; and to require from any air carrier . . . specific answers to all questions upon which the Board may deem information to be necessary . . . ."

Section 415 of the Act provides, in part:

> ". . . the Board is empowered to inquire into the management of the business of any air carrier and . . . to obtain from such carrier . . . full and complete reports and other information."

Unfair Trade Practices:

Section 411 of the Act provides, in part:

> "The Board may, upon its own initiative or upon complaint of any air carrier . . . investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find . . . that such air carrier . . . is engaged in such unfair or deceptive practices, or unfair methods of competition, it shall order such air carrier . . . to cease and desist from such practices or methods of competition."

Based on established principles of statutory construction, it is my opinion that none of the domestic functions contained in sections 401(d), 407, 411, and 415 survive the termination of the CAB. The Act explicitly states that the CAB is empowered to perform these functions. Title XVI of the Act abolishes the CAB, and no other agency has been assigned the authority to perform these functions in addition to or in place of the CAB.

Administrative agencies may exercise only such powers as are conferred on them, explicitly or implicitly, by positive law. See 3 Sands, Sutherland Statutory Construction, sections 65.01 and 65.02, and the cases collected therein. Since there is no legislation designating a body to succeed the

CAB, nor even any legislative history to indicate a successor agency, it cannot follow that Congress intended to transfer the purely domestic aspects of the functions contained in sections 401(d), 407, 411, and 415 of the Act to an undesignated body. These functions thus lapse. For similar reasons, the underlying requirement of section 401(a) that an air carrier must be in possession of a certificate issued by the CAB also lapses with respect to carriers engaged solely in domestic air transportation. 3/

It is only somewhat less clear whether the "safe and adequate" provisions of section 404(a) of the Act cease upon the termination of the CAB. Section 404(a)(1) provides, in part, that "It shall be the duty of every air carrier . . . to provide safe and adequate service, equipment, and facilities" in connection with air transportation authorized by its certificate. It thus might be argued that domestic air carriers retain the obligation to provide such safe and adequate service even after the termination of the CAB.

3/ Section 401(a) provides: "No carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation." Although it might be argued that the termination of the CAB does not affect the requirement of section 401(a) that an air carrier must possess a section 401 certificate, such a position would lead to the absurd result of absolutely curtailing any new entrants after the CAB's termination in 1985. Such a result would be contrary to the Congressional purpose of the Airline Deregulation Act, which was to accelerate new entry and expand service. Action on Smoking and Health v. CAB, 699 F. 2d 1209, 1214-15 (D.C. Cir. 1983). See also section 102(a)(10) of the Act.

However, such an argument ignores the fact that the section 404(a) duty is an obligation conditioned on the holding of a section 401 certificate. Although section 1601(a)(2)(B) of the sunset provisions explicitly preserves the "safe and adequate" service requirement at least from January 1983 to January 1985, there is no clear indication in either the Act or its legislative history that Congress intended the section 404(a) obligation to survive the lapsing of the underlying requirement that air carriers be certificated. Even without section 404(a), however, other provisions of the Act -- which are enforced by the FAA and continue in force -- serve to guarantee the "safety" of domestic air transportation.

Even if one were to assume, arguendo, that section 404(a) survives the lapse of the requirement for a section 401 certificate upon the termination of the CAB, there still would be no way to enforce the general duty expressed in section 404(a). No agency would be empowered to interpret or enforce the statutory duty or any of the CAB's implementing regulations. One court has already decided that Congress did not intend to create a private right of action to enforce section 404(a). Diefenthal v. CAB, 681 F.2d 1039, 1050 (5th Cir. 1982).

In addition, it might be argued that section 47 of the Airline Deregulation Act of 1978 preserves consumer regulations issued under section 404(a) of the Act. [4/] However, I believe the better view is that section 47 was intended only to preserve CAB regulations and other proceedings during the deregulatory transition period begun in 1978, but not beyond sunset. See S. Rep. 95-631, February 6, 1978, at 112.

It would be unreasonable to conclude that Congress intended to freeze into perpetual effect all the CAB's regulations, orders, and determinations -- most of which will become irrelevant, incapable of application, and unenforceable as to domestic operations -- upon the termination of the CAB. Furthermore, such a literalistic reading of section 47 would have the anomalous effect of preserving regulations in effect on October 24, 1978, but not if they were subsequently modified by the CAB. For these reasons, it is reasonable to regard the statutory termination of the CAB as the "operation of law" specified in section 47 that serves to repeal the Board's regulations, including those promulgated under section 404(a).

4/ Section 47 provides, in pertinent part:

"All orders, determinations, rules, regulations, permits, contracts, certificates, rates, and privileges which have been issued . . . by . . . the Civil Aeronautics Board . . . and which are in effect at the time this Act takes effect, shall continue in effect according to their terms until modified . . . or repealed by the Board . . . or by operation of law."

For these reasons, I conclude that the "safe and adequate" duty of section 404(a) of the Act lapses, or is at least rendered unenforceable, upon the termination of the CAB.

II. DOT AND FTC HAVE SUFFICIENT EXISTING AUTHORITY TO PERFORM FUNCTIONS NOW CARRIED OUT BY CAB

Although Title XVI of the Act itself does not transfer authority for the four domestic transportation functions discussed above to DOT or FTC, these agencies have sufficient existing statutory authority to perform virtually all of those duties currently carried out by the CAB. In general, the FTC would carry out the consumer protection duties, and DOT would carry out the fitness and data collection responsibilities.

A. Sections 411 and 404(a).

The FTC is empowered "to prevent persons, partnerships, or corporations . . . except . . . air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 . . . from using unfair or deceptive acts or practices in or affecting commerce." Section 5(a) of the FTC Act, as amended, 15 U.S.C. 45(a). When the CAB is terminated, air carriers involved in purely domestic transportation will no longer be subject to section 411 of the Act, which empowers the CAB to prevent unfair or deceptive practices or unfair methods of competition by an air carrier, foreign air carrier, or ticket agent. Although the air carriers will literally remain subject to the Act, the Congressional rationale for the exception to section 5(a) of the FTC Act will cease upon the CAB's sunset, for reasons

discussed below. Thus, it is my opinion that the FTC will re-acquire its authority to regulate unfair trade practices of domestic air carriers under section 5(a).

The air carrier exception to section 5(a) was first enacted in 1938, when Congress established the Civil Aeronautics Authority (CAA), the predecessor of the CAB. 5/ Congress vested the FTC's authority with respect to air carriers in the CAA because it concluded "that for the present the most efficient and advantageous regulation . . . could be secured by the coordination of all governmental functions relating to civil aeronautics in a newly created independent agency" (emphasis added). H. Rep. 75-2254 at 4, April 28, 1938. Congress believed that a single aeronautical agency was needed at that stage to avoid "inefficiency and duplication of effort." Id.

5/ Civil Aeronautics Act of 1938, June 23, 1938, ch. 601, section 1107(f).

Over the next forty years, Congress renamed the agencies responsible for economic regulation of domestic aviation, but the FTC exemption remained intact. 6/

Faced with a mature industry in 1978, Congress decided to terminate most of the CAB's economic regulatory functions with respect to air carriers involved in domestic transportation. With the scheduled 1985 termination of the CAB as an independent agency to oversee the domestic airline industry, the entire rationale for divesting the FTC of its section 5(a) authority over domestic air carriers will dissipate. At that point, there will no longer be a congressional intention to consolidate all governmental functions, or even all economic functions, in a single aviation agency to avoid inefficiency and duplication, because that "single agency" will no longer exist.

6/ In 1940, some of the safety functions under the Civil Aeronautics Act were vested in the Administrator of Civil Aeronautics and the remaining safety and economic functions were vested in the CAB. Reorganization Plan No. III, section 7, April 2, 1940, and Reorganization Plan No. IV, section 7, April 11, 1940. The Federal Aviation Act of 1958 replaced the 1938 statute, and further split the functions of the CAB into two parts -- transferring the safety functions to the new Federal Aviation Administration and retaining the economic functions in the CAB. As a technical matter, Congress also amended section 5(a) of the FTC Act to reflect the 1958 enactment. See section 1411 of the Act, P. L. 85-726.

I do note that air carriers will continue to be subject to FAA safety regulation under the Act (see Title VI) after the CAB is terminated. Thus, it might be argued, as a technical matter, that Congress intended the FTC to be divested of its section 5(a) authority so long as air carriers were in any way subject to the Act. However, such a strained, literal reading of section 5(a) of the FTC Act is not justified. While the starting point for the construction of a statute is the language of the statute itself, an overly literal reading of the statute may be avoided when such a reading would "thwart the obvious purpose" of the statute. Helvering v. Hammel, 311 U. S. 504, 511 (1941). See also 2A Sands, Sutherland Statutory Construction, sections 45.09, 45.12, and 54.06.

In this case, a literal reading of the FTC Act exception would lead to the unreasonable and unfounded conclusion that Congress intended to insulate air carriers from FTC jurisdiction over unfair and deceptive practices merely because they are subject to the FAA aviation safety authority. Such a reading of the section 5(a) exception would be manifestly inconsistent with its purpose, which was to prevent duplication of functions by the FTC and the single aviation agency. Although Congress deregulated domestic air carriers in 1978 as to route and rate authority to make them more competitive, there is no evidence that Congress intended to permit unfair or deceptive competition in the process. Indeed, Congress, at that time, explicitly stated its policy of preventing "unfair, deceptive, predatory, or anti-competitive practices in air transportation, . . ." See section 102(a)(9) of the Act, as added by the Airline Deregulation Act.

Almost all of the CAB's consumer regulations are based on the joint authority of sections 404(a) and 411 of the Act. Thus, it is my view that the FTC will be able, under its own section 5(a) authority, to regulate air carriers involved in domestic transportation in all areas currently regulated by the CAB under its section 411 authority, such as unfair advertising, oversales (or overbooking), notices of terms of contract carriage, domestic baggage liability, bonding and escrow for charter operators, and the current rulemaking regarding computer reservation systems.

B. Section 411.

Under section 401(d) of the Act, the CAB is required to determine if an air carrier is "fit, willing, and able" to perform its responsibilities. These certifications involve a mix of financial and safety considerations, with the CAB relying on the FAA for safety findings under current practice. As noted earlier (supra, at p. 3, and fn. 2), with the termination of the CAB and the failure to transfer domestic certification authority elsewhere, the requirement for domestic new entrants to obtain a section 401 certificate, and the prohibition against operating without one, both lapse.

A complete and meaningful review of carrier fitness can nonetheless be carried out by the FAA in judging a carrier's potential and continued safe operation in order to issue an operating certificate under section 604 of the Act, including financial and managerial matters to the extent that they have a bearing on aviation safety. Section 604 empowers the FAA to issue operating certificates, based on an investigation of whether the air carrier is properly and adequately equipped and able to conduct safe operations in accordance with FAA safety standards.

The abolition of the section 401(a) requirement for CAB domestic fitness certificates might be argued to pose several other issues besides that of carrier fitness. The Act provides that Federal pre-emption of the states' economic regulation of air carriers depends on the carriers' "having authority under Title IV of this Act to provide interstate air transportation." Section 105(a)(1) of the Act. If this language were narrowly interpreted to mean "having a 401 certificate to engage in air transportation," air carriers involved only in domestic transportation would not qualify for protection from state and local economic regulation. This narrow approach has already been rejected in Hughes Air Corp. v. Public Utilities Commission of the State of California, 644 F. 2d 1334, 1337 (9th Cir. 1981) (rejecting the argument that section 105(a)(1) "applies only to carriers who have been granted authority to operate by CAB certification," and holding that an exemption from the 401 requirement by the CAB under section 416 qualified an air carrier for the benefits of preemption).

A more reasonable meaning for the phrase "having authority under Title IV" requires a broader reading consistent with Congress' intent in 1978 that domestic air carriers -- which had been historically regulated in great detail by the CAB under Title IV of the Act --would henceforth be regulated by market competition, and subject to government regulation only in specific instances, (e.g., postal matters, agreements immunity) by the remaining authority of Title IV. By passing the Airline Deregulation Act, which enacted the preemption rule of section 105(a)(1), Congress intended to make a fundamental change in the "direction and policy of aviation regulation" by providing for a "gradual and phased transition to a deregulated system." H. Rep. 95-1779 at 56. Having made extensive and systematic reductions in Title IV economic regulation of domestic air carriers, and having simultaneously enacted a preemption provision to prevent states from regulating or re-regulating the same areas, Congress could not have intended the deregulated Federal environment of interstate air carriage to be replaced at the CAB's sunset by a patchwork quilt of state regulation, prescribed and enforced by 50 mini-CAB's. Thus, it is my opinion that section 105(a)(1) of the Act will provide for Federal preemption of economic regulation to the same degree after sunset as it does currently.

In another area, the abolition of the section 401(a) certificate might pose an issue with respect to certain authority of the FAA to regulate airport security. The FAA's authority under the Act to grant exemptions from rules on the screening of passengers, (section 315(b)), promulgate rules for the protection of passengers and property from criminal violence (section 316(b)), grant exemptions for airport security in Alaska (section 317), and exempt commercial aircraft from a requirement for emergency locator equipment (section 601(d)(2)(B)) are all established by reference to "air carriers certificated by the Board" or by similar language.

In enacting the Title XVI sunset provisions, Congress did not intend to deregulate the authority of the FAA in any respect. Congress stated, in section 107(a) of the Act, that it "intends the Airline Deregulation Act of 1978 (to) result in no diminution of the high standard of safety in air transportation attained in the United States at the time of the enactment of such Act." It also directed the Secretary to "take those steps necessary to ensure" that safety standards are maintained. section 107(b). See also section 102(a) of the Act. Moreover, the FAA has continuing broad authority to prescribe rules "necessary to provide adequately for national security and safety in air commerce" under section 601(a)(6) of the Act. I believe Congress intended for the FAA to have continued authority with respect to air carriers that, prior to sunset, were certificated or would have been subject to the certification requirement under the Act, and with respect to airports served by these carriers.

C. Sections 407 and 415.

The CAB is authorized to collect information from air carriers and to require the submission of reports regarding management, accounts, and stock ownership under sections 407 and 415 of the Act. This authority, with respect to domestic air carriers, will cease when the CAB terminates.

Nonetheless, DOT will still have adequate authority to collect information, relevant to the government's interest in aviation, because of the Secretary's independent authority under both the Act and the DOT Act.

The DOT Act, as recently codified in 49 U.S.C. 301, provides in part that the Secretary shall:

> "(3) promote and undertake the development, collection, and dissemination of technological, statistical, economic, and other information relevant to domestic and international transportation . . . ."

More specifically, the DOT Act also empowers the Secretary to "collect and collate transportation information the Secretary decides will contribute to the improvement of the transportation system of the United States." 49 U.S.C. 329(a). The codification also continues the Secretary's long-standing authority, previously set out in section 311 of the Act, to collect and disseminate information on civil aeronautics not collected by the CAB. 49 U.S.C. 329(b)(1). Termination of the CAB will effectively eliminate this exclusion, thus giving DOT and FAA broad latitude in assembling necessary aviation data.

These data collection functions can be enforced under section 902(e) of the Act which provides in part:

> "Any air carrier . . . who shall knowingly and willfully, fail or refuse to make a report to the . . . Secretary of Transportation as required by this Act, or to keep or preserve accounts, records, and memoranda in the form and manner prescribed or approved . . . shall be deemed guilty of a misdemeanor . . . ."

Together, these authorities will permit continued collection of all data necessary to carry out DOT's responsibilities under the Act.

CONCLUSION

For the reasons set forth above, I have concluded that the domestic functions of the CAB under sections 401(d), 404(a), 407, 415 and 411 of the Act are effectively extinguished and do not transfer to any other agency upon termination of the Board. I have also concluded that DOT and FTC have sufficient authority under their existing statutes to perform virtually all of those domestic functions following CAB sunset, so that no new legislation is needed.

/s/ Rosalind A. Knapp
Deputy General Counsel

Dated: January 26, 1984

Mr. MINETA. Please proceed.

TESTIMONY OF HON. ELIZABETH H. DOLE, SECRETARY, DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY MATT SCOCOZZA, ASSISTANT SECRETARY OF POLICY; AND JIM MARQUEZ, GENERAL COUNSEL

Mrs. DOLE. Thank you, Mr. Chairman. I'm delighted to have the opportunity today to present the Department of Transportation's plan for carrying out Civil Aeronautics Board sunset and for administering CAB functions after sunset.

Before describing our plans, I want to emphasize what an important undertaking I believe this to be. The Airline Deregulation Act that Congress enacted in 1978 was a milestone piece of legislation that signified the end of 40 years of Federal regulation and the beginning of a new era of airline independence and competition.

In the past 6 years, we have seen what a sound foundation the ADA laid for deregulation. Despite sweeping changes in Federal economic oversight, and the recent stress of an economic recession, as well as the PATCO strike, we have a highly competitive and fundamentally healthy industry today. Consumers have many more airlines, more service, and a wide variety of fares to choose among.

As the changes evolved during this 6-year period, there were a number of proposals to change and improve the Airline Deregulation Act. With the most minor exception, Congress wisely chose to stay with the legislation as enacted. And I do believe that is still the wisest course.

The act's provisions for the future of CAB's regulatory functions are both adequate and correct. Most functions will transfer to other agencies under explicit provisions of the ADA. In our view, the remaining functions which warrant continued Federal oversight can be assumed by DOT and the Federal Trade Commission under existing authority.

It will come as no surprise to this committee that our reluctance to propose or endorse legislation to clarify the ADA stems from a concern that any clarifying legislation could become the magnet for diverse amendments by special interests that could confuse or interfere with orderly sunset of the CAB.

If, however, Mr. Chairman, this committee concludes that legislation is necessary to clarify some aspects of the transfer of functions as set forth in the ADA, I would not be unalterably opposed, so long as the language is limited to the perceived areas of ambiguity and simply affirms or clarifies the existing jurisdictional arrangement for sunset.

I will not summarize all of the basis functions and describe where they go because you are familiar with what we intend to do. Instead, I refer you to my written testimony for the detail on how we would handle the international functions, the essential air service program, and the employee protection determinations required by section 43(a).

The ADA provides that CAB's antitrust authority will transfer to the Department of Justice. While there is some opinion that this responsibility should transfer to DOT instead, I must emphasize our

belief that Justice is the right place for antitrust decisions. It's consistent with that Department's overall responsibility for antitrust.

It's true that the ADA requires an assessment of transportation benefits for antitrust decisions. And certainly the Department of Transportation will continue its present policy of participating in cases which involve transportation policy considerations as contemplated by the act.

We have already been working with the Justice Department to be responsive to two antitrust matters of concern to the airlines. First, we have agreed that we will avoid duplication of authority in international tariffs and rates. Justice will review and act upon the organic arrangements of IATA, leaving consideration of fares and related matters to the Department of Transportation, as Congress clearly intended.

Second, in the domestic arena, Justice will consider granting limited antitrust immunity to prevent treble damage recoveries where the conduct has been, or is likely to be, the object of vexatious antitrust litigation.

I believe that as a result of the agreements that have been reached in these two areas, the airlines and others are becoming more comfortable with the Department of Justice exercise of the antitrust function.

With regard to fitness, currently the U.S. airlines must meet two types of fitness requirements in order to operate in the United States. First they must meet the strenuous safety standards of the FAA in order to receive safety fitness certification under section 604 of the FAA Federal Aviation Act.

Then they must meet the financial and managerial fitness standards of the CAB in order to receive economic fitness certification under sections 401 and 419 of the act.

After sunset all fitness authority that has any bearing upon safety will continue to be administered by the FAA. FAA will continue to require airlines to meet the highest standards of safety. And of course, the FAA is continually reviewing its fitness requirements. And this is a matter that will be ongoing. Any matters that are related in any way to safety would come within section 604 authority.

Economic fitness certification will change after sunset, however. This change will fulfill the ADA objective of deregulating the airlines and relying as much as possible on the marketplace, rather than the Federal Government, to determine whether and how an airline can do business.

The particular change in economic fitness certification that will occur at sunset is that carriers providing domestic service, other than commuter carriers specified in section 419 of the act, will no longer be subjected to a financial and managerial fitness review. These airlines will therefore be able to commence operations once they receive safety certification from the FAA.

For international air service and for section 419, commuter air carriers, the CAB authority to certify economic fitness will transfer to DOT along with the relevant programs. We will exercise the international fitness authority with an eye to preventing economically unfit carriers from compromising U.S. interests in international air service where entry is often limited by existing bilateral agreement.

34-015 O - 84 - 6

In our exercise of the section 419 commuter fitness authority, we will assure that essential air service to small communities will not be compromised by economically unfit carriers.

In all other respects we intend to minimize the Government role in economic fitness certification, consistent with the deregulatory spirit of the ADA.

Data collection is another CAB function that was not explicitly provided for in the ADA. However, we feel very strongly that the Department of Transportation has authority to collect all relevant data under other statutes than that on which CAB has relied.

With regard to consumer protection, I certainly have a very keen appreciation of the importance of consumer protection, since I served on the Federal Trade Commission and with the White House Office of Consumer Affairs and was an assistant to the President for Public Liaison.

Our sunset plan contains several features that will insure a continuing high level of responsiveness to consumer needs by the airline industry.

I would like to briefly review those features of our plan. First, all CAB's consumer authority related to international aviation transfers to DOT after sunset.

Second, for domestic air service, we believe that the authority to prevent unfair and deceptive trade practices by airlines will revert to the Federal Trade Commission.

Third, we will establish a new Office of Consumer Affairs in DOT to receive and respond to airline consumer complaints and questions. I would emphasize that that particular Office will serve as a clearinghouse. They will serve to clarify the nature of problems and to respond to consumer problems as travelers report difficulties. This particular Office will work with State and local governments to resolve problems, as well as with the carriers. And where it's a matter that requires action based on regulatory authority, then the Office will refer passengers to the appropriate agency—to DOT's Office of Policy and International Affairs for problems on international flights and to the FTC for problems on domestic flights.

We certainly will act in concert with the Federal Trade Commission in exercising this consumer authority.

Now as to personnel and staffing, I understand the subcommittee desires to consider staffing matters in this hearing. Our analysis of staffing needs after sunset, Mr. Chairman, is not yet complete. We're involved in ongoing discussions with the CAB and have been for some time regarding the staffing issue, and we will continue to work very closely with CAB as we define our legitimate staffing needs.

Our projections may benefit from the staffing study which OMB has requested from the CAB. In the meantime, I believe it would be premature to discuss the number of staff who would transfer.

In closing, then, I would like to make clear again my position on the need for new legislation. Our legal analysis concludes that new legislation is not necessary because under the ADA all functions that are consistent with the deregulatory objectives of the act can continue to be performed.

If, however, this committee wishes to enact legislation to clarify the transfer of functions, I am willing to consider such legislation on the

merits. It is vitally important that any new legislation not alter the jurisdictional arrangements that are provided for in the ADA.

Mr. Chairman, that completes my remarks, and I would like to submit a complete copy for the record.

Mr. MINETA. That's fine and thank you very much, Secretary Dole.

I particularly note and appreciate the comments you make on page 2 of the testimony. The administration position up to now, as I understand it, has simply been no bill. But today you are saying that you are "not unalterably opposed" to a bill, in effect saying that if we can do our job and keep the bill free of regulatory and extraneous provisions, that the administration will not oppose that bill. We accept that challenge and thank you for telegraphing your punches. It will help us to do what we need to do.

Mrs. DOLE. Mr. Chairman, we do continue to believe that no legislation is necessary to accomplish the goals of complete sunset. However, if the Congress in its wisdom believes that there is some need for clarifying legislation, if simply it's a matter of clarifying the ADA, if it's a matter of basically retaining the jurisdictional arrangement which is laid out in that milestone piece of legislation, we would cetainly want to work with you. I would not be unalterably opposed to such a procedure.

Mr. MINETA. As I understand it, your proposal for selecting carriers for international routes, contemplates that, first, an administrative law judge would conduct an on the record hearing and issue a recommended decision. Then this recommendation would be forwarded to the senior career official in the Office of Assistant Secretary for Policy and International Affairs for the final decision. Following this, the Assistant Secretary for Policy and International Affairs, or the Secretary in his or her discretion, would have authority to review the decision of the senior career official and either approve the decision or remand it for reconsideration.

Have I accurately described the basic organizational structure that you are proposing for carrier selection cases?

Mrs. DOLE. That's correct, Mr. Chairman. I believe that this is going to provide as much insulation as is at the CAB currently. This is because, under the Administrative Procedure Act, on-the-record hearings will be conducted by administrative law judges, ex parte contacts will be prohibited, and there will be separation of functions.

The senior career official in the Office of Policy and International Affairs will make a decision based on the hearing record. Then I or the Assistant Secretary for Policy would have the opportunity to review that decision and affirm or remand it only. Neither of us would have the opportunity to change or alter the senior career official's determination.

Of course, Presidential review would remain as it is now, limited to national security and foreign relations matters.

Mr. MINETA. In my opening remarks I gave some reasons why we might be concerned over having a Presidentially appointed political official such as the Secretary or an Assistant Secretary making final decisions in quasi-judicial cases, such as the selection of carriers for international routes. I again emphasize that these concerns are not directed to any particular official, but are designed to protect the process for the future. One area of concern is that a high level political

official in the executive department may be heavily involved in a legislative agenda, and there may be temptations to use aviation decisions to promote that agenda.

Second, high level political officials have no tenure in office. This may make it more difficult for them to resist pressures from political officials at the White House and elsewhere in the administration.

It would seem that DOT shares some of these concerns since your proposal contemplates a limited role for the Secretary and the Assistant Secretary in decisionmaking in carrier selection cases.

I'd like to explore the sufficiency of these limitations. First, your proposal contemplates that the Secretary or Assistance Secretary will have limited powers to review the decision of the career official.

Under your proposal the Secretary or Assistant Secretary would only be able to approve the career official's decision, or remand the decision for reconsideration. I wonder how different this authority to remand would be from the authority to reverse. Could your remand be accompanied by any written instructions as to why the decision was being remanded? Couldn't it be made obvious by these instructions or by other means what decision the Secretary wanted?

Mrs. DOLE. Mr. Chairman, we have tried to respond to legitimate concerns with regard to insulation. If you will recall, a year ago a major conference was held at the Department of Transportation. People came in from all over the country to work with us on this important question. And DOT has made a very sincere dedicated effort to provide insulation in a manner that would satisfy those concerns.

I am confident that we have achieved that. We have limited, the role of the Secretary to affirming or remanding decisions. There would not be discussion of issues, there would not be directions. It would be purely a remand.

I think to remove the Secretary entirely from these decisions, when it is the Secretary's responsibility for overall functions of the Department, would not be advisable. There should be an opportunity for the Secretary to have some involvement in this very, very limited way.

I feel that with a senior career person making the substantive determinations, with the full powers and protections of the Administrative Procedure Act, that we have insulated in a way that should convince you that we really intend to provide the same level of protection that is provided now at the CAB.

Mr. MINETA. I recognize that you have taken into consideration that whole issue of the decisionmaking authority, because you have gone to some great lengths in putting that decisionmaking authority in the hands of a senior career official, rather than in the hands of a political appointee.

Yet that official has political appointees as two immediate supervisers. Now, how much protection does that employee have simply by having civil service status. Although a career official may have the right to remain on the civil service roles, isn't his or her continuance in a high ranking position totally dependent on the Assistant Secretary or the Secretary?

For example, could he be removed from that assignment without any showing of good cause? Could he become the first GS–16 to be assigned to knocking ice off radar cables in Alaska? [Laughter.]

If so, how is that official insulated from pressures real or imagined from his supervisors? And your proposed structure, it seems to me, sinks or swims depending on how much insulation or protection is afforded the senior official in his or her role as decisionmaker.

Below that level, relatively standard procedural protections seem to be provided. The only protection I see provided to that person is civil service status. Obviously we don't normally consider civil service status alone enough to protect judges or the traditional decisionmakers and independent regulatory agencies.

So why is it enough protection in this instance?

Mrs. HAAS. Mr. Chairman, because we're getting into detail, I would like to have our General Counsel come forward to join me. I'm going to ask the Assistant Secretary for Policy to join me as well, because his office would house many of CAB's functions after sunset.

First, however, let me return to an earlier question. In terms of a remand by the Secretary or the Assistant Secretary for Policy if there were any comment, any remark at all, it would be on the record. In other words, there would be an opportunity for public review and court review, if the Secretary or the Assistant Secretary for Policy were to make any statement at all when remanding a decision. That statement would be on the record.

As to the prior question, with regard to civil service requirements and whether or not——

Mr. LENTSCH. Excuse me. Will the chairman yield at that point before you go to the next civil service part? Did I understand you to say that there would be judicial review?

Mrs. HAAS. I'm sorry, yes.

Mr. LENTSCH. Judicial review of a designation of an international air carrier's route?

Mrs. HAAS. The hearing is conducted by an administrative law judge. Obviously the decision of the administrative law judge is subject to further review. In the case of an arbitrary or capricious decision, there would be an opportunity, under the APA, for judicial review.

Mr. LENTSCH. Thank you, Mr. Chairman.

Mr. MINETA. Secretary Dole.

Mr. SCHUMER. Mr. Chairman, with respect to your question about the senior career civil servant, I would point out that he or she would at the very minimum be in the Senior Executive Service. The SES is a cadre of professionals that move up a variety of positions throughout the executive branch. I'm sure you're aware that they are interchangeable and that they are always subject of a noncareer position.

But I would like to suggest that at the Civil Aeronautics Board to [illegible] the Director of the Bureau of International Aviation [illegible]

and the result is inconsistent with the instituting order. Since the senior career civil servant has not carried out his mandate, a remand by myself or the Secretary would be called for and it would have to be a completely on-the-record remand explaining why the senior career civil servant's decision was not consistent with the challenge to the administrative law judge. It would have to be completely on the record.

This would, obviously, be a situation where, if we were improperly maneuvering around the senior career civil servant, it would be obvious.

I don't think there would be an opportunity for mishandling a senior career civil servant in order to give an improvement route to a particular carrier.

First of all, we've got the best watchdogs around—an airline industry that is very diligent in watching all the steps taken at the Board and at the Department of Transportation. If anybody steps out of line, it's going to be evident and we'll have to account for it, either before your committee, Mr. Levine's oversight subcommittee, or the Senate committee.

Mr. Mineta. In carrier selection cases, what procedures will be utilized in processing cases once the ALJ renders his or her recommended decision? Will parties be permitted to submit briefs to, and make oral arguments before the senior career official?

What about before the Secretary or Assistant Secretary? Will the senior career official, the Secretary and Assistant Secretary be subject to the rules of having ex parte communications at all stages of the proceeding?

Mrs. Hall. The various parties, including our General Counsel's office representing the public, will appear before the administrative law judge. Beyond that point we don't anticipate appearances for oral argument.

Ex parte contacts would be prohibited.

Mr. Mineta. And if such procedural protections as ex parte rules, decisionmaking based on the record, and so on, are applied to the senior career official, the Assistant Secretary and the Secretary, do they apply in some rare instance involving her responsibility, or simply because you have made a policy choice that they should apply?

If the latter, what would prevent some future Secretary from deciding that they do not apply to these individuals?

Mrs. Hall. Mr. Chairman, it's my view that they apply because we believe that would require these procedures, and they're true procedures.

Mr. Mineta. As a practical matter, the senior career official would need a staff to support his or her decisionmaking role. Would

meticulous exercise right now at the Department of Transportation to insure that we observe the APA's separation of functions requirement. We have to make absolutely certain that all staff, including those in the General Counsel's Office that would be advising the Secretary or myself, the Assistant Secretary for Policy and International Affairs, would have to be segregated from the staff that would be filing pleadings before the senior civil servant in the process of his or her review of ALJ decisions.

We will assure that fine lines of distinction are drawn between the various advisors of decisionmakers. We're going through that now with respect to the labor protection proceedings, which are underway at the Civil Aeronautics Board at the present time. If C.A.B. does not complete these proceedings before sunset, we will have to conclude some of those proceedings. In that case, we have to make sure that DOT staff who are participating in our petitions before the Board at the present time will not also advise the Secretary of the line to make a decision.

These mediating procedures will be very evident in our rules of practice and in how we set up our internal procedures. This is because we have a tremendous respect for the separation of functions.

Mrs. DOLE. Those from the General Counsel's Office who appear as public counsel would not in any way be permitted to advise either myself or the Assistant Secretary for Policy in the decisionmaking process. And they would report to the Deputy General Counsel, who is a career civil servant.

Mr. MINETA. Are you preparing yourself for the quiz-show as well? [Laughter.]

As a practical matter have you considered having a board of more than one official making the final decisions?

Mrs. DOLE. Mr. Chairman, we don't feel that it's necessary to set up a mini-CAB within the Department of Transportation. We feel that with this procedure which we have laid out there's proper insulation. We have gone to great lengths to make certain, as the Assistant Secretary has mentioned, that these protections are carefully thought through and that there's separation of function.

We feel that this is going to achieve the goal, while it is also consistent with our organization. So I don't feel that a board of decisionmakers is the proper approach at Transportation.

Mr. MINETA. One of the comments I have heard about is a few about having that kind of a "court," a one person thing, so to speak. And I am wondering, is that an unfounded fear in terms of having a one person case?

Mrs. DOLE. I think so. I don't foresee that danger. You know, for something to a senior civil servant is very consistent with our Department as we are organized now. I really don't see why it would be a problem when applied to ALJ function.

Mrs. DIXX. Congresswoman Hammerschmidt, this is an area where, of course, I would not be operating in a vacuum. Matters will be brought to my attention. For example, currently in the area of environmental concerns, I periodically intervene to review a matter with regard to environment. As I conduct my responsibilities in the Department, I am very much aware of what is occurring. I will obviously be aware of certain matter.

And when it a matter of significant import, I, of course will be contacted. I am certain in certain instances I will be made aware of important matters that are coming forward. And in these instances, I would feel that Ishould take a look at it—either I or the Assistant Secretary.

Mr. HAMMERSCHMIDT. Do you anticipate that you would issue guidelines which would govern those instances where you would want to exercise the veto authority?

Mrs. DIXX. I have not anticipated a need of that sort, Congressman Hammerschmidt.

Mr. HAMMERSCHMIDT. Let me change over to personnel issues for a moment. One of the personnel issues which has arisen involves the Department's plan for transferring CAB people who now work in the so-called support functions, such as personnel specialists and budget analysts.

How does DOT plan to determine which of these support employees should transfer to you?

Mrs. DIXX. Well, we have begun a series of discussions with CAB which have been ongoing for a couple of months now. And we are working very cordially with the CAB in order to make determinations as to what we transfer and how those functions will be handled.

I will single out one area, the essential air service program. We feel that a separate fee should be set up within the office of the Secretary to handle the function. And we anticipate now that it will be administered at DOT pretty much as it is at the CAB. There would not be a lot of change in terms of policy or personnel. It would be administered with about the same number of staff and the same kinds of responsibility.

So, I see that is one area where we will be using the expertise of CAB to determine what staffing will be needed. Of course, we will be reviewing the way that CAB is doing the work, probably toward the end of April, that we can make final determinations.

Mr. HAMMERSCHMIDT. I think your response—you have to program people rather than support people. If you do have some plans on how that determination will be made, we would like it now or you could supply it for the record here either one.

I think it will be an important part of our hearings. It is really not a question that [illegible] because we are still working through this whole process with CAB and final determinations really haven't been made.

Mrs. DOLE. Yes; however, I think that it is important for us to review the study that has been requested by GMH before we make any further comments in this area.

[Information received follows:]

It is the CAB's responsibility, and not DOT's, to determine which employees transfer at onset, in accordance with Federal civil service law, Office of Personnel Management (OPM) guidance, and Merit Systems Protection Board precedent. In general, OPM's Federal Personnel Manual (FPM) indicates that when functions are transferred, administrative support employees also have transfer rights depending on the duties they perform. The FPM gives certain maintenance employees as an example of administrative support employees that do not transfer. The CAB has also indicated that it believes that support personnel in areas that have been contracted out by the awarding agency are not entitled to transfer, but must be RIFed prior to transfer.

Mr. HAWKINS. Since you mentioned the essential air service program, let me get for the record the reason for the difference in decisionmaking structure between international cases and essential air service cases. You have two different methods, of course, for making this determination.

We have already discussed the selection process for international route awards. However, in EAS cases, decisions reached within the Office of EAS can be reversed outright by the Assistant Secretary or the Secretary.

Obviously DOT feels that decisionmaking in the area of international route awards should be more insulated than the EAS function, and I wonder if you would comment on the difference in procedure.

Mrs. DOLE. Congressman Hammerschmidt, basically the same procedures apply with regard to the EAS and the international area in terms of the Administrative Procedure Act. That is applicable all the way.

There is insulation. However, there is a slight difference in terms of the ultimate decisionmaking which you might want to comment on, Matt.

Mr. SCOCOZZA. In the present situation, Mr. Chairman and Congressman Hammerschmidt, I think CAB devotes a tremendous amount of credit for the fine job they have done with the EAS operation. We have therefore tried to duplicate the same situation at the Department of Transportation, insofar as our resources allow.

I know that in many situations CAB members actually go to hold hearings and listen to both sides of a particular story. I am particularly referring to community appeal of EAS service determinations.

We will also provide for a similar level of review at the political appointee level.

But these people are insulated. We do have to do everything on the record, [by] evidence, any changes have to be consistent with EAS criteria which are set out in the statute.

Mr. HAWKINS. [I'm not really being critical of the two-tier decision at the Secretary level]

Mr. SCOCOZZA. The A.P.A. process does not apply to the EAS program,

doubly sure that the resources of the whole Department are behind all of our EAS decisions. The ALJ process is something we have a tremendous respect for in the international area, and insofar as we want to make doubly sure that we are doing everything possible to provide the same quality of decision in the EAS program. That's the reason for the extra level of plenary review, which is not the case in our proposed EAS structure.

Mr. HAWKINS-SMITH. As I see it then, really in the EAS cases, the Secretary's role is just the same as the CAB role has been in the past; is that not so?

Mr. SCHULTZE. [Nodding affirmatively.]

Mr. HAWKINS-SMITH. Apparently there is some ambiguity in the law as to whether senior executive service employees have the same transferring rights as non-SES employees.

Does the Department intend to transfer those SES employees of the CAB who are performing functions which are expected to transfer at once?

Mrs. DOLE. Those decisions are still under review. Certainly some of the SES employees would be transferred, but how many is still being coordinated with the CAB.

Mr. HAWKINS-SMITH. Well, DOT has indicated it would like to transfer anywhere from 200 to 300 CAB employees to the Department at once.

Considering that the Board currently has a total of about 415 employees and expects to have no more than 320 at once, your estimate still leaves a lot of questions unanswered about your plans for current Board employees.

When do you believe you can give us a more accurate picture of the Department's plans, and I wonder if you could submit that also for the record?

Mrs. DOLE. Yes. We have never stated a number formally, Congressman Hawkins-Smith, and that is still under review. At the appropriate time, when we have completed the process, I will be very happy to provide that information, and, of course, to work with this committee.

[Information received follows:]

[Redacted]

Mr. HAWKINS-SMITH. I think it would be helpful to the committee if you would provide a breakdown of those CAB employees DOT op-

[Redacted]

Mr. HAMMERSCHMIDT. Mr. Chairman, that's all I have at this time.

Mr. MINETA. Mr. Levitas?

Mr. LEVITAS. Thank you, Mr. Chairman.

Mrs. Dole, I recognize that the Deregulation Act in its most provisions transferred the antitrust functions to the Department of Justice.

In your judgment, is that the best place for it to be?

And I ask you that question for this reason. At the time when the decisions were being made when the Deregulation Act was before us, it was thought that we had to make some call at that point, and DOJ of course had the background and experience in antitrust, as did FTC for that matter. But the more I have thought about it, the more I have had some questions myself as to whether the Department of Justice is the appropriate place in light of the actual experience of the Department in dealing with antitrust matters, which seems to me to be almost an incurable coming down on the side that something is anticompetitive and never recognizing the need to approve agreements or arrangements that might technically violate antitrust laws or are, in fact, in the long run better for the consumers.

It is this attitude experience in the Department of Justice over the years, and I question it, wonder whether based on your experience you have any views on that?

Mrs. DOLE. Congressman Levitas, I believe that the Justice Department is the right place for this function. Of course, the Justice Department is responsible for the overall antitrust matters. The Department has been a major litigant in proceedings before the CAB in numerous instances, and also has participated in interagency meetings on aviation policy. Certainly Justice has been a very vigorous and very valuable participant in these activities.

With regard to a knowledge of the airline industry, I would add that I think the Department of Transportation will of course be continuing its participation and representation with regard to transportation benefits. I therefore believe the airline antitrust function should be housed where the overall U.S. antitrust responsibility is carried out.

Now the Department of Justice has antitrust authority under the Sherman Act, which sets the standard for transportation airline antitrust immunity authority. The Department have already taken place between the Justice Department and the industry to clarify some existing aspects of the airline industry. For example, industry members are concerned that in certain instances where activity has been sanctioned over many years there might be involving costly litigation, and the Antitrust Division has indicated that it is willing to consider granting limited antitrust immunity, perhaps 2 or 3 years of immunity, to give the industry an opportunity to adjust their contracts and to take care of this particular concern.

[illegible] the Justice Department has worked with the Department

organic agreements of IATA, while the Department of Transpor-

industry is feeling more comfortable with the role of the Justice Department, and I do believe that is the right place for that function to be administered.

We believe our plan for CAB sunset fits most appropriately with existing government responsibilities. One further point: Transferring antitrust immunity to DOT could set a bad precedent with regard to sunset in other areas. I believe that it would be inconsistent with the organization of the executive branch. It is better, as Congress determined in 1978, to put it at the Justice Department.

Mr. LEVITAS. It might be useful as we look down the line to hear from Justice Department witnesses, probe their understanding and sensitivities in the transportation area, because simply to take an academic, dogmatic, Justice Department position on antitrust matters in the areas that we're talking about may not serve the public's interest, and perhaps with your concurring comments, it might be useful to get something on the record from them, which leads me to the next question about the Federal Trade Commission, which will handle, as I understand it, consumer concerns except for international, and I think you will have a clearinghouse of some sort.

Mrs. DOLE. The international consumer functions clearly transfer to the Department of Transportation as well as consumer functions with regard to the essential air service program. It's only the non-EAS domestic consumer functions that transfer to the FTC.

Mr. LEVITAS. Now you, of course, have experience as a former member of the Federal Trade Commission. In your judgment, is the Federal Trade Commission staffed and capable of handling individual type complaints of the sort that you would need to, because my experience has been with the FTC at the consumer complaint level, that they really are not set up to do it, that most of the type of broken television set or refrigerator repair that doesn't work type of situation has to be handled by State or city consumer affairs offices, because FTC just isn't equipped to do it.

Mrs. DOLE. First of all, let me go back to the way these complaints would come into the Department of Transportation.

We will have an office within the Office of the Assistant Secretary for Intergovernmental Affairs of the Department of Transportation, to route consumer complaints and concerns and to be the interface with the public, with State and local organizations, and with other governmental organizations. We anticipate that airline consumer concerns will come in that office, which would serve as a clearing house. That office would will be able to respond to or get them out of the consumer complaint domain, Congressional function, and we should be very active in that regard.

So we see that as the place where problems may be resolved directly. If it's a legal matter that requires regulatory authority, the international matters would be referred to the Office of the Assistant Secretary for Policy and International Affairs. I assume matters that involve

with the exception of the airline industry, CAB employees would be

to the Department of Justice to provide that airline antitrust expertise at Justice. The same thing will be occurring at the Federal Trade Commission.

Section 5(a) was first enacted in 1938 at the same time that the Congress established the Civil Aeronautics Authority, which was the predecessor to the CAB. It seems very clear to me in looking at the statutory construction and the legislative intent, that it was concluded for the present, and I quote,

> The most efficient and advantageous regulation could be secured by the co-ordination of all government functions relating to civil aeronautics in a newly created independent agency.

Thus it seems that when the CAB sunsets, the airline exemption, which was provided specifically at the same time in order to coordinate all of this in one agency, also sunsets.

Mr. LAVERNE. You think FTC can do that?

Mrs. DOLE. Yes; I do. The FTC's basic authority is to prohibit any unfair, deceptive acts or practices and unfair methods of competition. This covers all industries, with the exception of one which was specifically exempted at the time the Civil Aeronautics Authority was established.

Mr. LAVERNE. I have one last question, Mr. Chairman, at this point, and that is along the lines that both you and Mr. Hammerschmidt were questioning.

Mrs. Dole, in the international aviation decisionmaking process, you have described your view of it, what safeguards you think it will provide and how it would operate.

In the course of that explanation, you made several references to—and your word was, "I will make the decision," or "me" or "Mr. Secretary," or whoever it was that was involved at some point in time——

Mrs. DOLE. In the award of international aviation routes?

Mr. LAVERNE. Yes.

Mrs. DOLE. No. The final decisionmaking authority on that rests with the entire cabinet council. Beyond that, it is a matter of me being able to review it, merely to approve it, but not to change that decision in any way or motion or to alter that decision.

Mr. LAVERNE. Do you think that that process should be written into law, rather than have it structured by each administration when they come in? In other words, if this is a good approach, wouldn't it make sense not to let it simply be the call of whoever might be the Secretary of Transportation at the time as to how it be set up? If this is a good approach, shouldn't we actually write it into law?

Mrs. DOLE. I feel not——

Mr. LAVERNE. It's a valid question now indicated by the questions that have been raised.

Mrs. DOLE. One plan is not simple to set up a procedure and send a notice around. The process will be established through rules.

Mr. MARQUEZ. Of course, Congressman, our view still is that it doesn't need to be legislated. I believe that the procedure that would be set up by regulation would be sufficient.

Mr. LEVITAS. I understand that you don't think it needs to be legislated. That's not my question.

My question is, should it be legislated if it's a good system, in order to avoid your successors who may not be as impartial or fairminded or wise as you from changing it?

Mr. MARQUEZ. I guess my position or our position still is that we don't believe that it is legislatively required. I would think that as sensitive as the issue is, that no one would want to change the process or in any way open up the issue of "lack of sensitivity" to the insulation issue.

Mrs. DOLE. I think it would not be a good precedent, Congressman Levitas, to go in that direction. I don't think the same kind of decision-making is legislated in any other instance that I am aware of.

I think if there seems to be a problem once this procedure is underway, we could always look to a legislative approach, but I don't think it would be wise to start out that way.

Mr. LEVITAS. I want to think about that some more, because that does trouble me. It's a very sensitive area.

I can see some successor in your position who might alter that system simply by regulation, and if it's a good system and that's what we're looking at, then it might be taken by us as a recommendation for legislation in order that we can be assured that this system will be in place, and if it is ever to be changed, somebody would come to the Congress to ask that change.

Thank you very much, Mr. Marquez.

Mr. MOORHEAD. Mr. McEwen?

Mr. MCEWEN. No questions at this time, Mr. Chairman. Thank you.

Mr. MOORHEAD. Mr. Valentine?

Mr. VALENTINE. Thank you, Mr. Chairman.

Mrs. Dole, as you, I am sure, know, the CAB has under consideration, docket 37[illegible] that is in the twilight of its life, has under consideration, as I understand it, the promulgation of a rule which would essentially ban any type of smoking on airline flights, etc. I believe, for 200 miles or so. I understand that representatives of your Department have testified and have stated that in their opinion such a ban would create the possibility, if not a reasonable assurance, that there would be an increase in the risk of [illegible] fires because [illegible] one being what it is—and most of us remembering our days in school when we used to sneak off somewhere to smoke a cigarette—and no question it—I assume that that has to still undergo consideration, no question to me, is not me, whether or not the Department of Transportation has issued a Notice of Proposed Rulemaking, so as to be clear and avoid [illegible] and providing factors, is that in the event that the CAB [illegible] such a regulation, that your Department could [illegible]?

Rulemaking with regard to fire extinguishers and smoke detectors in

Mr. VALENTINE. Considering the spirit of freedom that this whole proposition is supposed to imply, would you care to express an opinion as to whether or not the CAB at this time in its history should become involved in this type of complete prohibition?

Mrs. DOLE. Congressman, we have of course submitted comments, as you said, in support of CAB Proposed Rulemaking, so we have taken the position that it is appropriate for them to move forward in that direction.

While we provided CAB with our views on the best way to regulate smoking, I would add that we do strongly support minimum regulation of industries where possible, and we are confident that the marketplace can do an adequate job in the future with regard to regulating smoking.

Of course you have Mor Airlin- already——

Mr. VALENTINE. Mrs. Dole, would you regard this as a minimum type of regulation, to say to the airlines, if you fly certain distances, that nobody can light a cigarette on that airplane, but they can smoke? What about individual rights and freedoms? What about deregulation?

Do you regard that as a minimum application?

Mrs. DOLE. Yes. You now, we have taken a position, Congressman Valentine, with regard to this matter. The CAB, I understand, will probably come to a decision in the near future. This is something they anticipate taking action on before sunset.

Mr. VALENTINE. Would any other product or commodity subjected to the same thing? For example, was there any suggestion that there be any ban on the distribution of alcoholic beverages on airplanes that fly less than 200 miles?

Mrs. DOLE. I'm not sure that that was part of the rulemaking, no.

Mr. VALENTINE. Does it seem to you that it would be fair to say that people could drink all the booze they wanted to on that airplane but couldn't smoke a cigarette?

Mrs. DOLE. I think it is a matter of the convenience of the other passengers, Congressman Valentine. It's based on convenience.

Mr. VALENTINE. Sold? What about those that don't want to have liquor—don't want to sell booze on an airplane or have it distributed up and down the aisle? [Laughter.]

Mrs. DOLE. When we have Chairman McKinnon before you, he can identify the environment that led them to propose this particular rule. [Laughter.]

Mr. VALENTINE. Thank you, ma'am. I know that's the most appropriate person to whom should address those remarks, and I will.

Let me say in conclusion that I'm sure that a lot of your good friends back in North Carolina don't know of your attitude toward our principal product! [Laughter.]

Mrs. DOLE. Only not.

Mr. VALENTINE. But I would never tell them. [Laughter.]

Mrs. DOLE. They shall know. I visited Winston-Salem recently.

Mr. VALENTINE. I gave to speak and not quickly.

Mr. MINETA. Mr. Oberstar?

Mr. OBERSTAR. Thank you, Mr. Chairman. I hadn't intended to pick up on smoking after Congressman Valentine.

In response, however, to page 11 of your testimony, you assure that there will be adequate protection for the interests of airline passengers on the grounds that airlines will continue to honor this preference by maintaining separate areas.

What if they don't? What are you and the FAA and the successor entities going to do about that?

Mrs. DOLE. My conviction is that the marketplace will indeed be responsive.

Mr. OBERSTAR. If it isn't?

Mrs. DOLE. We are saying the market is going to be the regulator. There is no authority for Federal regulation of smoking after sunset, because it did not transfer.

Mr. OBERSTAR. We have seen some rather widely publicized incidents about a smoker who insisted on clouding the cabin with his pipe, and the pilot set down and put that person off the airline.

Suppose that in the deregulated environment in which the airline doesn't have the rule of law to back it up, is the captain going to be subject to a lawsuit by that pipe smoker?

Mrs. DOLE. Well, there is a prohibition against cigars and pipe smoking on airlines.

We're having a legal discussion here.

[The witnesses confer.]

Mrs. DOLE. I think we should give you a definitive answer. We don't want to be trying to get into specifics today without being absolutely certain that we have a definitive answer, so could we submit that for the record?

Mr. OBERSTAR. I would very much like to have a precise legal description of what are the rights of nonsmokers in the deregulated, post-sunset environment.

Mrs. DOLE. Right. And you have another hearing coming up later, which will look into the legal aspects of CAB functions, including smoking authority.

We do feel strongly that the airlines are going to be responsive to the preference of the majority of travelers to be seated in a nonsmoking area. I am confident that the preference of smokers and nonsmokers will be respected, and that market demand that will be reflected in airline smoking policies. But we will be happy to supply that information.

(See page 94.)

Mr. OBERSTAR. I haven't quite so much confidence in that free market demand.

Mrs. DOLE. Let me point out that authority to regulate smoking on international flights does transfer to DOT, so we will be responsible for regulating that after sunset.

Mr. OBERSTAR. I don't doubt that the airlines will want to respect the preference of passengers. [illegible]

[illegible] AS A ITEM IN SUCH EXPORTS.

Up to now the airlines have had the support of law. Once that protection is no longer present and an airline is subjected to a lawsuit by someone who insists upon the right to smoke, the nonsmoker's right may then be in jeopardy. I don't know that the airlines want to face continuous litigation over this matter. It's not a matter of whether they want to do something or not. It's a matter of what legal condition will the nonsmoker be in and the airline in that deregulated—if you can address that matter in writing precisely, I would very much appreciate it.

Mrs. Doax. Thank you.

[The following was received for the record:]

The Department's analysis of the legal rights of non-smokers aboard domestic commercial flights following sunset of the Civil Aeronautics Board on January 1, 1985, is contained in the legal opinion of the Department's General Counsel dated January 26, 1984. Discussion of this issue appears at pages 86 through 89 and at page 53 of the opinion. A copy of the legal opinion is attached for inclusion at an appropriate point in the record of the proceedings.

U.S. Department of Transportation
Office of the Secretary of Transportation

42

OPINION OF THE GENERAL COUNSEL

IMPACT OF "SUNSET" ON CERTAIN CAB FUNCTIONS

This opinion examines Federal aviation and airline deregulation statutes to determine whether certain domestic air transportation functions of the Civil Aeronautics Board (CAB) -- which are neither explicitly terminated nor listed for transfer by the "Sunset Provisions" enacted by Congress in 1978 -- nonetheless transfer to the Department of Transportation (DOT) or other agencies rather than cease when the CAB terminates.

In particular, this opinion is concerned with four major functions currently performed by the CAB: section 401(d) domestic carrier "license" certification; section 404(a) "safe and adequate" service regulation; section 407 and 419 rate collections; and section 411 "unfair trade practices" regulation.

For the reasons that follow, I have concluded that none of these functions transfers to DOT or any other agency as a result of the sunset provisions. However, I have also concluded that DOT and the Federal Trade Commission (FTC) will have sufficient authority to perform almost all of these functions under their existing statutes, so that no additional legislation will be needed to continue these functions once the CAB terminates.

1. TITLE XVI DOES NOT TRANSFER THE FOUR DOMESTIC FUNCTIONS

The functions of the CAB are set out in the Federal Aviation Act of 1958 ("the Act") [1/], as amended by the Airline Deregulation Act of 1978 [2/]. The sunset provisions, in Title XVI of the Act, provide for the progressive dismantling of the CAB and the functions it performs, commencing on October 24, 1978, and accelerating on December 31, 1981, and January 1, 1983. The process culminates on January 1, 1985, with the abolition of the CAB (by repeal of Title II of the Act) and the transfer of certain functions to other named agencies. See section 1601 of the Act.

International aspects of all CAB functions not abolished clearly transfer under section 1601(b)(1)(B) of the Act, and are not at issue in this opinion. The purely domestic aspect of certain other CAB functions contained in the Act are neither explicitly terminated nor transferred by Title XVI. Those domestic functions and the relevant statutory provisions are:

1/ Public Law 85-726, Aug. 23, 1958, as amended, 49 U.S.C. 1301 et seq.

2/ Public Law 95-504, October 24, 1978.

Fitness:

Section 401(d) of the Act provides, in part:

> "(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder . . . ."

Safe and Adequate Service:

Section 404(a)(1) of the Act (though repealed in large measure in 1981 and 1983) provides, in part:

> "It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers authorized to engage in scheduled air transportation by certificate or by exemption under Section 416(b)(3) of this title: to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers."

Data Collection:

Section 407 of the Act provides, in part:

> "(a) The Board is empowered to require annual . . . and special reports from any air carrier . . .; to prescribe the

> manner and form in which such reports shall be made; and to require from any air carrier . . . specific answers to all questions upon which the Board may deem information to be necessary . . . ."

Section 415 of the Act provides, in part:

> ". . . the Board is empowered to inquire into the management of the business of any air carrier and . . . to obtain from such carrier . . . full and complete reports and other information."

Unfair Trade Practices:

Section 411 of the Act provides, in part:

> "The Board may, upon its own initiative or upon complaint of any air carrier . . . investigate and determine whether any air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find . . . that such air carrier . . . is engaged in such unfair or deceptive practices, or unfair methods of competition, it shall order such air carrier . . . to cease and desist from such practices or methods of competition."

Based on established principles of statutory construction, it is my opinion that none of the domestic functions contained in sections 401(d), 407, 411, and 415 survive the termination of the CAB. The Act explicitly states that the CAB is empowered to perform these functions. Title XVI of the Act abolishes the CAB, and no other agency has been assigned the authority to perform these functions in addition to or in place of the CAB.

Administrative agencies may exercise only such powers as are conferred on them, explicitly or implicitly, by positive law. See 3 Sands, Sutherland Statutory Construction, sections 65.01 and 65.02, and the cases collected therein. Since there is no legislation designating a body to succeed the

CAB, nor even any legislative history to indicate a successor agency, it cannot follow that Congress intended to transfer the purely domestic aspects of the functions contained in sections 401(d), 407, 411, and 415 of the Act to an undesignated body. These functions thus lapse. For similar reasons, the underlying requirement of section 401(a) that an air carrier must be in possession of a certificate issued by the CAB also lapses with respect to carriers engaged solely in domestic air transportation. 3/

It is only somewhat less clear whether the "safe and adequate" provisions of section 404(a) of the Act cease upon the termination of the CAB. Section 404(a)(1) provides, in part, that "It shall be the duty of every air carrier . . . to provide safe and adequate service, equipment, and facilities" in connection with air transportation authorized by its certificate. It thus might be argued that domestic air carriers retain the obligation to provide such safe and adequate service even after the termination of the CAB.

3/ Section 401(a) provides: "No carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation." Although it might be argued that the termination of the CAB does not affect the requirement of section 401(a) that an air carrier must possess a section 401 certificate, such a position would lead to the absurd result of absolutely curtailing any new entrants after the CAB's termination in 1985. Such a result would be contrary to the Congressional purpose of the Airline Deregulation Act, which was to accelerate new entry and expand service. Action on Smoking and Health v. CAB, 699 F. 2d 1209, 1214-15 (D.C. Cir. 1983). See also section 102(a)(10) of the Act.

However, such an argument ignores the fact that the section 404(a) duty is an obligation conditioned on the holding of a section 401 certificate. Although section 1601(a)(2)(B) of the sunset provisions explicitly preserves the "safe and adequate" service requirement at least from January 1983 to January 1985, there is no clear indication in either the Act or its legislative history that Congress intended the section 404(a) obligation to survive the lapsing of the underlying requirement that air carriers be certificated. Even without section 404(a), however, other provisions of the Act -- which are enforced by the FAA and continue in force -- serve to guarantee the "safety" of domestic air transportation.

Even if one were to assume, arguendo, that section 404(a) survives the lapse of the requirement for a section 401 certificate upon the termination of the CAB, there still would be no way to enforce the general duty expressed in section 404(a). No agency would be empowered to interpret or enforce the statutory duty or any of the CAB's implementing regulations. One court has already decided that Congress did not intend to create a private right of action to enforce section 404(a). Diefenthal v. CAB, 681 F.2d 1039, 1050 (5th Cir. 1982).

In addition, it might be argued that section 47 of the Airline Deregulation Act of 1978 preserves consumer regulations issued under section 404(a) of the Act. [4/] However, I believe the better view is that section 47 was intended only to preserve CAB regulations and other proceedings during the deregulatory transition period begun in 1978, but not beyond sunset. See S. Rep. 95-631, February 6, 1978, at 112.

It would be unreasonable to conclude that Congress intended to freeze into perpetual effect all the CAB's regulations, orders, and determinations -- most of which will become irrelevant, incapable of application, and unenforceable as to domestic operations -- upon the termination of the CAB. Furthermore, such a literalistic reading of section 47 would have the anomalous effect of preserving regulations in effect on October 24, 1978, but not if they were subsequently modified by the CAB. For these reasons, it is reasonable to regard the statutory termination of the CAB as the "operation of law" specified in section 47 that serves to repeal the Board's regulations, including those promulgated under section 404(a).

4/ Section 47 provides, in pertinent part:

"All orders, determinations, rules, regulations, permits, contracts, certificates, rates, and privileges which have been issued . . . by . . . the Civil Aeronautics Board . . . and which are in effect at the time this Act takes effect, shall continue in effect according to their terms until modified . . . or repealed by the Board . . . or by operation of law."

For these reasons, I conclude that the "safe and adequate" duty of section 404(a) of the Act lapses, or is at least rendered unenforceable, upon the termination of the CAB.

II. DOT AND FTC HAVE SUFFICIENT EXISTING AUTHORITY TO PERFORM FUNCTIONS NOW CARRIED OUT BY CAB

Although Title XVI of the Act itself does not transfer authority for the four domestic transportation functions discussed above to DOT or FTC, these agencies have sufficient existing statutory authority to perform virtually all of those duties currently carried out by the CAB. In general, the FTC would carry out the consumer protection duties, and DOT would carry out the fitness and data collection responsibilities.

A. Sections 411 and 404(a).

The FTC is empowered "to prevent persons, partnerships, or corporations . . . except . . . air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 . . . from using unfair or deceptive acts or practices in or affecting commerce." Section 5(a) of the FTC Act, as amended, 15 U.S.C. 45(a). When the CAB is terminated, air carriers involved in purely domestic transportation will no longer be subject to section 411 of the Act, which empowers the CAB to prevent unfair or deceptive practices or unfair methods of competition by an air carrier, foreign air carrier, or ticket agent. Although the air carriers will literally remain subject to the Act, the Congressional rationale for the exception to section 5(a) of the FTC Act will cease upon the CAB's sunset, for reasons

discussed below. Thus, it is my opinion that the FTC will re-acquire its authority to regulate unfair trade practices of domestic air carriers under section 5(a).

The air carrier exception to section 5(a) was first enacted in 1938, when Congress established the Civil Aeronautics Authority (CAA), the predecessor of the CAB. 5/ Congress vested the FTC's authority with respect to air carriers in the CAA because it concluded "that for the present the most efficient and advantageous regulation . . . could be secured by the coordination of all governmental functions relating to civil aeronautics in a newly created independent agency" (emphasis added). H. Rep. 75-2254 at 4, April 28, 1938. Congress believed that a single aeronautical agency was needed at that stage to avoid "inefficiency and duplication of effort." Id.

5/ Civil Aeronautics Act of 1938, June 23, 1938, ch. 601, section 1107(f).

Over the next forty years, Congress renamed the agencies responsible for economic regulation of domestic aviation, but the FTC exemption remained intact. 6/

Faced with a mature industry in 1978, Congress decided to terminate most of the CAB's economic regulatory functions with respect to air carriers involved in domestic transportation. With the scheduled 1985 termination of the CAB as an independent agency to oversee the domestic airline industry, the entire rationale for divesting the FTC of its section 5(a) authority over domestic air carriers will dissipate. At that point, there will no longer be a congressional intention to consolidate all governmental functions, or even all economic functions, in a single aviation agency to avoid inefficiency and duplication, because that "single agency" will no longer exist.

6/ In 1940, some of the safety functions under the Civil Aeronautics Act were vested in the Administrator of Civil Aeronautics and the remaining safety and economic functions were vested in the CAB. Reorganization Plan No. III, section 7, April 2, 1940, and Reorganization Plan No. IV, section 7, April 11, 1940. The Federal Aviation Act of 1958 replaced the 1938 statute, and further split the functions of the CAB into two parts -- transferring the safety functions to the new Federal Aviation Administration and retaining the economic functions in the CAB. As a technical matter, Congress also amended section 5(a) of the FTC Act to reflect the 1958 enactment. See section 1411 of the Act, P. L. 85-726.

I do note that air carriers will continue to be subject to FAA safety regulation under the Act (see Title VI) after the CAB is terminated. Thus, it might be argued, as a technical matter, that Congress intended the FTC to be divested of its section 5(a) authority so long as air carriers were in any way subject to the Act. However, such a strained, literal reading of section 5(a) of the FTC Act is not justified. While the starting point for the construction of a statute is the language of the statute itself, an overly literal reading of the statute may be avoided when such a reading would "thwart the obvious purpose" of the statute. Helvering v. Hammel, 311 U. S. 504, 511 (1941). See also 2A Sands, Sutherland Statutory Construction, sections 45.09, 45.12, and 54.06.

In this case, a literal reading of the FTC Act exception would lead to the unreasonable and unfounded conclusion that Congress intended to insulate air carriers from FTC jurisdiction over unfair and deceptive practices merely because they are subject to the FAA aviation safety authority. Such a reading of the section 5(a) exception would be manifestly inconsistent with its purpose, which was to prevent duplication of functions by the FTC and the single aviation agency. Although Congress deregulated domestic air carriers in 1978 as to route and rate authority to make them more competitive, there is no evidence that Congress intended to permit unfair or deceptive competition in the process. Indeed, Congress, at that time, explicitly stated its policy of preventing "unfair, deceptive, predatory, or anti-competitive practices in air transportation, . . ." See section 102(a)(7) of the Act, as added by the Airline Deregulation Act.

53

Almost all of the CAB's consumer regulations are based on the joint authority of sections 404(a) and 411 of the Act. Thus, it is my view that the FTC will be able, under its own section 5(a) authority, to regulate air carriers involved in domestic transportation in all areas currently regulated by the CAB under its section 411 authority, such as unfair advertising, oversales (or overbooking), notices of terms of contract carriage, domestic baggage liability, bonding and escrow for charter operators, and the current rulemaking regarding computer reservation systems.

B. Section 401.

Under section 401(d) of the Act, the CAB is required to determine if an air carrier is "fit, willing, and able" to perform its responsibilities. These certifications involve a mix of financial and safety considerations, with the CAB relying on the FAA for safety findings under current practice. As noted earlier (supra, at p. 3, and fn. 2), with the termination of the CAB and the failure to transfer domestic certification authority elsewhere, the requirement for domestic new entrants to obtain a section 401 certificate, and the prohibition against operating without one, both lapse.

A complete and meaningful review of carrier fitness can nonetheless be carried out by the FAA in judging a carrier's potential and continued safe operation in order to issue an operating certificate under section 604 of the Act, including financial and managerial matters to the extent that they have a bearing on aviation safety. Section 604 empowers the FAA to issue operating certificates, based on an investigation of whether the air carrier is properly and adequately equipped and able to conduct safe operations in accordance with FAA safety standards.

The abolition of the section 401(a) requirement for CAB domestic fitness certificates might be argued to pose several other issues besides that of carrier fitness. The Act provides that Federal pre-emption of the states' economic regulation of air carriers depends on the carriers' "having authority under Title IV of this Act to provide interstate air transportation." Section 105(a)(1) of the Act. If this language were narrowly interpreted to mean "having a 401 certificate to engage in air transportation," air carriers involved only in domestic transportation would not qualify for protection from state and local economic regulation. This narrow approach has already been rejected in Hughes Air Corp. v. Public Utilities Commission of the State of California, 644 F. 2d 1334, 1337 (9th Cir. 1981) (rejecting the argument that section 105(a)(1) "applies only to carriers who have been granted authority to operate by CAB certification," and holding that an exemption from the 401 requirement by the CAB under section 416 qualified an air carrier for the benefits of preemption).

A more reasonable meaning for the phrase "having authority under Title IV" requires a broader reading consistent with Congress' intent in 1978 that domestic air carriers -- which had been historically regulated in great detail by the CAB under Title IV of the Act --would henceforth be regulated by market competition, and subject to government regulation only in specific instances, (e.g., postal matters, agreements immunity) by the remaining authority of Title IV. By passing the Airline Deregulation Act, which enacted the preemption rule of section 105(a)(1), Congress intended to make a fundamental change in the "direction and policy of aviation regulation" by providing for a "gradual and phased transition to a deregulated system." H. Rep. 95-1779 at 56. Having made extensive and systematic reductions in Title IV economic regulation of domestic air carriers, and having simultaneously enacted a preemption provision to prevent states from regulating or re-regulating the same areas, Congress could not have intended the deregulated Federal environment of interstate air carriage to be replaced at the CAB's sunset by a patchwork quilt of state regulation, prescribed and enforced by 50 mini-CAB's. Thus, it is my opinion that section 105(a)(1) of the Act will provide for Federal preemption of economic regulation to the same degree after sunset as it does currently.

In another area, the abolition of the section 401(a) certificate might pose an issue with respect to certain authority of the FAA to regulate airport security. The FAA's authority under the Act to grant exemptions from rules on the screening of passengers, (section 315(b)), promulgate rules for the protection of passengers and property from criminal violence (section 316(b)), grant exemptions for airport security in Alaska (section 317), and exempt commercial aircraft from a requirement for emergency locator equipment (section 601(d)(2)(B)) are all established by reference to "air carriers certificated by the Board" or by similar language.

In enacting the Title XVI sunset provisions, Congress did not intend to deregulate the authority of the FAA in any respect. Congress stated, in section 107(a) of the Act, that it "intends the Airline Deregulation Act of 1978 (to) result in no diminution of the high standard of safety in air transportation attained in the United States at the time of the enactment of such Act." It also directed the Secretary to "take those steps necessary to ensure" that safety standards are maintained. section 107(b). See also section 102(a) of the Act. Moreover, the FAA has continuing broad authority to prescribe rules "necessary to provide adequately for national security and safety in air commerce" under section 601(a)(6) of the Act. I believe Congress intended for the FAA to have continued authority with respect to air carriers that, prior to sunset, were certificated or would have been subject to the certification requirement under the Act, and with respect to airports served by these carriers.

C. Sections 407 and 415.

The CAB is authorized to collect information from air carriers and to require the submission of reports regarding management, accounts, and stock ownership under sections 407 and 415 of the Act. This authority, with respect to domestic air carriers, will cease when the CAB terminates.

Nonetheless, DOT will still have adequate authority to collect information, relevant to the government's interest in aviation, because of the Secretary's independent authority under both the Act and the DOT Act.

The DOT Act, as recently codified in 49 U.S.C. 301, provides in part that the Secretary shall:

> "(3) promote and undertake the development, collection, and dissemination of technological, statistical, economic, and other information relevant to domestic and international transportation . . . ."

More specifically, the DOT Act also empowers the Secretary to "collect and collate transportation information the Secretary decides will contribute to the improvement of the transportation system of the United States." 49 U.S.C. 329(a). The codification also continues the Secretary's long-standing authority, previously set out in section 311 of the Act, to collect and disseminate information on civil aeronautics not collected by the CAB. 49 U.S.C. 329(b)(1). Termination of the CAB will effectively eliminate this exclusion, thus giving DOT and FAA broad latitude in assembling necessary aviation data.

34-015 O - 84 - 8

These data collection functions can be enforced under section 902(e) of the Act which provides in part:

> "Any air carrier . . . who shall knowingly and willfully, fail or refuse to make a report to the . . . Secretary of Transportation as required by this Act, or to keep or preserve accounts, records, and memoranda in the form and manner prescribed or approved . . . shall be deemed guilty of a misdemeanor . . . ."

Together, these authorities will permit continued collection of all data necessary to carry out DOT's responsibilities under the Act.

CONCLUSION

For the reasons set forth above, I have concluded that the domestic functions of the CAB under sections 401(d), 404(a), 407, 415 and 411 of the Act are effectively extinguished and do not transfer to any other agency upon termination of the Board. I have also concluded that DOT and FTC have sufficient authority under their existing statutes to perform virtually all of those domestic functions following CAB sunset, so that no new legislation is needed.

/s/ Rosalind A. Knapp
Deputy General Counsel

Dated: January 26, 1984

Mr. OBERSTAR. I read with interest your comments on page 9 indicating that essential air service to small communities will not be compromised by economically unfit carriers.

How is that going to be accomplished precisely in this deregulated environment? You know with respect to the commuters, we have seen more sunsets than a midsummer frolic—of those commuters who have gone into business and gone out of business, and they have been sunseted with greater rapidity than the CAB.

Mrs. DOLE. Are you speaking to the broad question of deregulation and the commuters coming into this field?

Mr. OBERSTAR. I want to know how, without the regulations which we have had, small communities, served by commuter airlines but which once had trunk carriers, are going to be assured that they won't have more startups and shutdowns in airline service without Federal Government review of the economic fitness of the carrier? How are you going to accomplish that?

Mrs. DOLE. Mr. Congressman, the essential air service transfers to the Department of Transportation. We anticipate administering the program as the CAB is doing it now. In other words, we really don't see any changes in the policies or the practices.

Mr. OBERSTAR. Would you state exactly how that is going to be carried out?

Mr. MARQUEZ. Maybe the CAB can answer it much more explicitly than I can, because I'm not thoroughly familiar with their procedure. However, my basic understanding is——

Mr. OBERSTAR. The CAB isn't going to exist.

Mr. MARQUEZ. As we said, Congressman, those procedures are going to be transferred over to us, and we would intend to carry them out in the same fashion CAB does.

Mr. OBERSTAR. I would hope that you would know what those procedures are going to be.

Mr. SCOCOZZA. Mr. Chairman, if my colleague will yield for a second, with respect to fitness, we expect to maintain the same level of scrutiny that the Civil Aeronautics Board does with respect to——

Mr. OBERSTAR. What personnel are you going to have to do that?

Mr. SCOCOZZA. To provide an answer, I would have to go into detail and I beg your indulgence.

Mr. OBERSTAR. Go ahead, please.

Mr. SCOCOZZA. With respect to the international area, there are people in the Bureau of International Affairs at the Civil Aeronautics Board who were assigned to fitness responsibility. They will be transferring to DOT with the rest of the international program staff. They will be assigned the international economic and financial fitness responsibility that they now have at the Civil Aeronautics Board. They will continue to do the same thing at the Department of Transportation.

In the essential air service area—and I certainly defer to our colleagues from the Civil Aeronautics Board to get into detail about that office—CAB generally has personnel responsible for carrier fitness certification within that EAS office. We expect to transfer that office to DOT, so we expect the same people will be doing the same fitness certification at the Department of Transportation.

The question then arises over fitness in the non-EAS domestic area, let's just say Knoxville, Tenn., to Paducah, Ky. In that particular situation, there is no specific provision in the ADA that type of carrier fitness would be transferred to the Department of Transportation.

I would add Congressman—now we're talking about the Department of Transportation—that the FAA always has a responsibility in the fitness area. They certify whether or not a carrier is safe. That is an important overlying consideration which will continue for all categories of airline service, including this particular category of non-EAS domestic service.

Now we certainly expect that the FAA's review of the safety fitness of a carrier will certainly look into whether or not that carrier is financially able and make sure that the carrier continues to stay safe and continues to have the resources to keep its physical plant operating.

Mr. OBERSTAR. That has not been a charter of the FAA. You were saying that there is going to be transfer of personnel in the international travel area. Of those persons who have been charged with economic fitness of international travel, they will be transferred to the domestic area? Did I understand you to say they will also review the 419 program.

Mr. SCOCOZZA. The essential air service fitness certification personnel would transfer with that office, and it would continue business as usual. However, Congressman, our interpretation of the act is that it does not speak with respect to domestic financial fitness, the type of fitness that the Civil Aeronautics Board presently administers.

Mr. OBERSTAR. That is precisely what I am concerned about, because as I said earlier, we have had a plethora of commuters rise and fall, and small communities don't know whether they are going to have essential air service, whether they are going to have air service at all.

I would like you to submit in writing who they are, and what their responsibilities will be in the post-CAB era, because that is something that we have responsibility to review to assure that communities are not going to be isolated.

The loss of adequate air service results in crowding out hub airports. In my State of Minnesota at the Minneapolis-St. Paul Airport, the Airport Commission has spent $12 million expanding its parking accommodations to accommodate not the expansion of air service from the hub, but from traffic from communities beyond the hub. People drive to the cities when they don't get reliable service from those commuters who are supposed to pick that up, because those commuters weren't financially able to carry on that work, and nobody really looked hard enough at their financial fitness.

If we are going to have continuation of that condition in the future, then I think we should know so that the Congress can take, if necessary, appropriate legislative action.

[The information received follows:]

DOT's paramount objectives for the EAS program are to transfer it intact from CAB to DOT, together with staff, and to take all the necessary steps to prevent any disruption of EAS program operations.

The DOT Office of Essential Air Services will have the following divisions and functions:

Essential Air Services Division I: Establish EAS service level definitions; process suspension notices; process carrier selection cases; evaluate carrier reliability; monitor air carrier performance; and process community appeals.

Essential Air Services Division II: Same functions as Division I. (Two divisions are provided for administrative and management effectiveness.)

Air Carrier Subsidy Need Division: Conduct rate negotiations with carriers (both interim and final rates) and set subsidy levels.

Special Authorities Division: Process commuter fitness determinations, as required by Section 419(c) of the FAAct. (Certain non-EAS functions that are currently administered in this Division at the CAB would not be retained in the Office of Essential Air Service at DOT. These non-EAS functions include insurance monitoring and charter monitoring.)

Mr. OBERSTAR. For example, what authority will there be for trunk airlines to enter into agreements with commuters on a single fare from, say, Grand Rapids, Minn., through Minneapolis-St. Paul to Florida?

An exclusive arrangement by a trunk carrier with a commuter to enter into such service?

Mr. SCOCOZZA. Mr. Chairman, I would like to give you a detailed response to that for the record, but I do not see any reason why a carrier would not be able to negotiate with a commuter to feed itself or to provide through fares.

Mr. OBERSTAR. Will you look at the legalities of that question? There are some open legal questions. Please report back in writing.

Mr. SCOCOZZA. I would be delighted to, Mr. Chairman.

[Information received follows:]

The Department of Transportation is aware of no prohibition on so-called trunk carriers entering into agreements with commuter carriers to provide through transportation on the two carriers under a single ticket and fare. The requirement of section 404 of the Federal Aviation Act of 1958 that carriers enter into "just and reasonable . . . joint rates, fares, and charges" terminated as to domestic transportation on January 1, 1983, as a result of deregulation of the industry undertaken in 1978. The Department continues to support this element of deregulation.

As for an "exclusive" arrangement between two carriers to establish joint rates, certain air carriers have undertaken direct contractual arrangements with each carrier with which it interlines, rather than remaining under an industry-wide standard arrangement.

Mr. SCOCOZZA. I would like to add, in all of our meetings with all of the carriers, virtually all of the carriers who are part of the ATA and other associations, none have brought this specific problem to us. Perhaps your office could help us with knowing some of the specific problems in order to do a better job in answering your question.

Mr. OBERSTAR. This is very important to the economic survival of small communities, those under 50,000 population. We don't want to see another exodus from rural America to the cities as we saw in the 1920's, and cutting off the assurance of adequate air service will certainly prompt another exodus.

Thank you.

Thank you, Mr. Chairman.

Mr. MINETA. Mr. Packard?

Mr. PACKARD. Thank you, Mr. Chairman.

We are very pleased, Mrs. Dole, that you could be here and testify before the committee. Let me proceed further on what my colleague from Minnesota was discussing with you.

As you know, the CAB investigates carrier fitness in separate proceedings and gives full opportunity for hearings. The Board proceeds

to weed out many of the carriers on the basis of those findings in their hearings.

As we transfer that fitness authority over to DOT, will you conduct separate opportunities for hearings? Or will this authority be pulled in with the other procedural matters in terms of safety review to where this will not become a major issue in determining whether a carrier can fly or not?

Mr. SCOCOZZA. Congressman, are you speaking in general or with respect to any type of service, domestic service or international service?

Mr. PACKARD. In general.

Mrs. DOLE. Of course the FAA would continue to do safety determinations as it does now, because FAA gives the input from the safety side to the CAB. And as we see it, any safety-related matters would be handled by FAA.

Now with regard to the international functions, you may want to comment on that.

Mr. PACKARD. Will this continue to be a separate area of consideration, however, in your review process?

Mr. SCOCOZZA. Obviously FAA will continue to weed out particular carriers with safety problems, but domestically carriers can operate everywhere, as long as they meet safety illness standard and if they are providing essential air service or international service, they must meet certain economic criteria.

But there is yet one other step if they want to provide international service, sir. They would have to go through the ALJ proceeding, because there may be five fit carriers, but through an international negotiation, there may be only one opportunity. In that case, there will have to be an on-the-record ALJ proceeding, a full administrative process in an adversary fashion, with testimony from all sides on a particular question, to determine which carrier is the one most suitable for a particular route.

So there will be different levels of fitness that carriers will have to go through.

But we certainly foresee the situation that in all cases carriers will have to provide on-the-record information with respect to their fitness to provide service, period. And in the international area, it goes one further degree—whether they are more suitable than other carriers who are equally fit, willing, and able to provide service.

Mr. PACKARD. Then you have investigators who will determine the fitness of a carrier in terms of finances, the health of pilots and all other aspects that are currently being investigated? Those criteria will be still a part of the process of determining the fitness of the carrier?

Mr. SCOCOZZA. As we described earlier to Congressman Oberstar, there would be different types of reviews for different situations. The essential air service fitness investigations will be done as they are now. The international fitness investigations will be done as they are now. Domestic fitness, as I described earlier, is not specifically provided for in the ADA.

But the level of scrutiny by the FAA will obviously be higher. The level of scrutiny by the Department of Transportation will certainly take into consideration that this was not specifically covered by the ADA.

Mr. PACKARD. Let me get back to the smoking issue. I would rather make a comment than ask a question.

Certainly I would hope that as the authority is transferred in regard to the regulations relating to smoking, irrespective of the concerns of my colleague that there may be some legal problems and perhaps some lawsuits, I have not been aware of any significant amount of lawsuits that now exist under the current policies and regulations. Certainly the public has expected and asked for more and more nonsmoking areas. I think the smoking area has moved further and further back to where now it only includes—at least on those flights that I fly—only the last few rows, which indicates that the public is able to receive consideration of their desires.

In the DOT sunset plan, you mentioned that the Department will publish proposed revisions of the CAB's procedural regulations later this spring.

Would you tell us if you know at this time whether you can expect to make any changes in the Board's procedures in the areas of carrier selection, essential air service and also in the international carrier selection cases?

Mrs. DOLE. Basically, our June 1984 rulemaking is intended to bring the procedures over in toto. In other words, we will simply try to tailor them to a new Department, but we don't anticipate making changes in the procedures other than those necessary, for a new Department to handle the function.

We anticipate the final rules will be issued in November, and the rules would be ready to take effect January 1 of 1985.

Mr. PACKARD. Thank you, Mr. Chairman. I have no further questions.

Mr. MINETA. Thank you, Mr. Packard.

Secretary Dole, you have described the organizational structure you are proposing largely in terms of international route awards. You do also note in your testimony that EPP primary cause determinations would be made in the same manner. What about other major decisions of economic value that your Department would be expected to make, such as EAS carrier selection cases, fitness determinations in international cases, EAS cases and perhaps other types of cases? Whatever we decide constitutes adequate protection and insulation for international carrie selection cases, wouldn't the same logic require these procedures for these other decisions granting valuable economic rights?

Mrs. DOLE. Basically the same system does apply with regard to EAS and section 43, the labor provision.

Mr. MINETA. What about the cases of fitness determinations? Would there be hearings?

Mr. SCOCOZZA. Congressman, once again, it would depend on the type of service, but if it's essential air service, we would maintain the same level of scrutiny and the same practice, insofar as we can pick it up from the CAB and put it at the Department of Transportation.

As I mentioned earlier, CAB deserves a lot of credit for doing such a fine job in that area, and we want to duplicate it insofar as our organizational structure and the Administrative Procedure Act will allow. In the international area, we expect to have the same level of fitness scrutiny.

But in the domestic area, it is somewhat different. We would certainly have the FAA continuing fitness oversight in the safety area. To compensate for the sunset of CAB, we would have to make sure that the FAA's level of scrutiny is more intense to take account of the Civil Aeronautics Board's review of the financial fitness and the management fitness of the carrier. That's intertwined with safety. But because the CAB is doing it now, the FAA has not had to get into that intense degree of financial scrutiny.

FAA will obviously have to get into the financial area insofar as it is intertwined with safety, and the Department of Transportation under our umbrella for maintaining safe and adequate transportation, will certainly have to make sure that the next level of scrutiny is there.

So in the context of safety the level of quality in assuring that a carrier is fit to provide service would not be diminished, in our view. The specific ways that we would do that, Congressman, are still in the process of being negotiated with the Civil Aeronautics Board. We want to find out how to do that, because this would be a whole new exercise for DOT.

Mr. MINETA. Well, what about 404, where you are dealing with "safe and adequate" under the present law? Where does that go after January 1, 1985?

Mr. SCOCOZZA. Congressman, I guess I should have qualified my statement when I said "safe and adequate." Our safe and adequate umbrella is not to be confused with the safe and adequate provision in section 404 of the Federal Aviation Act. We believe that provision lapses on January 1, 1985, insofar as smoking is concerned, but under our legal opinion—and I would certainly defer to our General Counsel—we would have the opportunity to insure fitness, to insure the integrity of the carriers that are in the skies, financial as well as safety.

Mr. MINETA. With respect to your plans for staffing to handle your new responsibilities, we are not only talking about numbers of people, we are also talking about the basic statutory protections afforded to Federal employees by civil service law, a body of law which is not amendable either by you or frankly by this committee, since it is not within our jursidiction.

However, my reading of civil service law is that CAB, as the transferring agency, has the responsibility for determining how many CAB employees are working in the transferring programs at the time of sunset. Now these employees have the right under law to be transferred to DOT. They will become full-fledged DOT employees at that point. It is only after this transfer takes place that there is an option to DOT saying that it does not plan to add enough new slots to accommodate the transferring employees plus its existing employees. Any reduction in force at DOT, which DOT then chooses to make, must involve both old DOT employees and new DOT employees who have transferred from CAB.

I assume we have no disagreement that this is, in fact, a protection afforded to Federal employees of a sunsetting agency under civil service law. Is that correct?

Mrs. DOLE. That's our interpretation of the law, yes.

Mr. MINETA. Now under civil service law, it first of all is not DOT's responsibility to determine how many CAB employees will transfer to DOT. Second, CAB employees, properly identified by their agency, have a right to transfer. And third, it is only after the transfer has taken place that DOT has any authority to adjust slots.

In short, there is no legal basis for DOT to be involved before sunset in the issue of how many CAB employees will transfer at sunset. DOT pressure in this area could interfere with basic employee rights under civil service law.

Yet despite this, we have heard many reports that DOT officials have been pressuring CAB to cut back on the number of employees who will transfer at sunset. DOT's tactics in this area appear to have included asking OMB to ask CAB to make a staffing study, and CAB has repeatedly made prior studies of what positions will transfer. Could you please tell us whether any DOT officials have been authorized to try to persuade CAB to cut back on the number of employees assigned through transferring functions?

Mr. MARQUEZ. I don't believe, Congressman, that anybody has been instructed to tell CAB to diminish the number of employees. I think the procedure or the process that we have been going through internally at the Department is to try to find out for ourselves, to determine exactly how many we think we would need to carry out the functions as we see them.

I don't think we disagree that CAB certainly has its own authority and its responsibility to determine how many of their people they think should be transferred to DOT. We certainly don't think we can tell them that.

So to answer your question, no, we have not been instructed to tell CAB to reduce their numbers. We have been conducting our own internal analysis of that, however.

Mr. MINETA. To the best of your knowledge, have any DOT officials been trying to persuade CAB to cut back either directly or indirectly through OMB?

Mr. SCOCOZZA. Mr. Chairman, we have had meetings with the Office of Management and Budget. We have not sent a formal memo to the Office of Management and Budget. Our responses have always been that we are talking with the Civil Aeronautics Board. It is the Office of Management and Budget who decides whether or not the OMB Director signs a letter or not. They certainly are not an instrument of the Department of Transportation, as the Department of Transportation is not an instrument of any other particular agency.

But we have, in fact, had very frank discussions at the Department and at the Civil Aeronautics Board to try to help the Board understand what level of employees we think are appropriate. And as I mentioned last week in an appropriations hearing, we didn't want to reveal the actual number we're at now, because it's always changing and it's actually rising.

The reason I think there's some frustration is that the Civil Aeronautics Board has not seen a rubber stamp of the numbers they have identified for transfer. But we are continuing to work in earnest with them. The Appropriations Committee last week asked for a specific report giving a single staffing number from both departments.

Chairman McKinnon and I both said that we would do all that we could to provide that, but I don't think we'll ever be able to do that. We will certainly try to explain to Congress what our staffing levels are, but there is a very sincere effort for both agencies to provide a joint staff estimate. We do respect the fact that it is the Civil Aeronautics Board, as we mentioned in testimony before the Appropriations Committee, that makes the decision on exactly who transfers and who does not transfer.

And certainly, sir, your recitation of the law is correct. We will inherit the transferees designated by the Civil Aeronautics Board. And we have no right at all to intimidate or in any way encourage the Board to change that number.

Mr. PACKARD. Would the chairman be kind enough to yield on that point?

Mr. MINETA. Surely.

Secretary Dole, did you wish to add something on that?

Mrs. DOLE. No; I just wanted to underscore that I had asked Assistant Secretary Scocozza several months ago to work with the CAB on this matter, and I think there has been a very, very sincere effort to move forward in a responsible way to address these matters.

I can understand your concerns, but I think the integrity of the process has been maintained and that there is a very sincere and professional effort to identify exactly what the needs are and to move forward in a very straightforward manner.

Mr. MINETA. Mr. Packard?

Mr. PACKARD. Pursuing that a little further, in your preliminary review of the transition that takes place as it relates to personnel, do you anticipate that you will be able to perform the functions that heretofor have been performed by the CAB with the reduction in force?

In your judgment at this present time, does it appear that there will be an opportunity for a reduction in force?

Mrs. DOLE. I would prefer at this point not to make comments with regard to the numbers. I feel that while the process is still under discussion, we are just simply not at a point where we can provide intelligent answers. We're still working through the process.

We do anticipate, as I mentioned earlier, reviewing the study that CAB will complete for OMB by the end of April. We are continuing to work with CAB almost on a daily basis on staffing matters. I just don't believe that it is advisable at this point to make any statements with regard to numbers until this process is complete.

Mr. PACKARD. I can accept that. Thank you.

Mr. MINETA. I discussed in my opening remarks how CAB staffing has been significantly reduced in the past few years. The Board forecasts that at sunset it will have about 300 employees working in functions which will transfer to DOT, even without further legislation. As we have discussed, assuming that CAB does not choose to alter that estimate, those 300 people transfer to DOT. If after sunset you decide that you do need that many new slots to handle your new aviation responsibilities, do you feel you have room to accommodate that many new positions in your fiscal year 1985 budget requests to the Congress?

Mr. SCOCOZZA. Mr. Chairman, I don't believe we do at this particular time. I would be glad to provide a detailed answer with the

specifics, but this involves FTE's, full-time equivalents, with which I am not well versed. But I do feel comfortable in suggesting that if the number is 300, we could not accommodate that number.

Now the degree to which we can, we would certainly be glad to provide that for the record. This would require agreement with OMB and our Budget Office, but we will try to provide that for the record as soon as possible.

[Information received follows:]

The President's fiscal year 1985 budget will accommodate the transfer of up to a maximum of 282 full-time permanent employees from CAB.

Mr. MINETA. The issue of consumer protection will be discussed more fully at our next meeting, but I do have a question about your plans to administer the consumer protection authority which you believe you will receive if no law is enacted.

As I understand your testimony, you interpret existing law as giving you all of CAB's consumer protection authority for international aviation and essential air service. For other domestic air service, you believe that some of CAB's authority will be inherited by the FTC.

Now this raises the question of how consumer protection would work for flights which involve a segment regulated by DOT and a segment regulated by FTC. For example, suppose a flight starts as an essential air service flight and then continues as an ordinary domestic flight, will procedures be developed to prevent different DOT and FTC regulations from applying to the two segments of the flight? Suppose one agency is less enthusiastic about consumer protection than the other.

Mrs. DOLE. Basically we would do all of the case work in that instance, Mr. Chairman. We also anticipate that there would be a very close liaison with the FTC, such as a memorandum of understanding with regard to the two functions and the coordination thereof. But in this instance, we would anticipate doing all the case work ourselves.

Mr. MINETA. Isn't that more a case of rulemaking than case load?

Mr. SCOCOZZA. Mr. Chairman, if I might interject—and I would invite you to get the specific numbers from the CAB, because I'm not well versed in the exact numbers—but in terms of the consumer complaints that have come to the Civil Aeronautics Board, I believe it's between 8,400 and 9,000 per year. I think that's the average. If that continues to be the case, then we expect our Consumer Information and Assistance Office to handle that many complaints, whether they be international baggage problems or domestic baggage problems. We would have a liaison with all the carriers and try to work out every consumer complaint.

It is our plan to provide all consumers of air services with information and assistance in instances where a complaint comes to the Department of Transportation.

If resolution of a particular consumer's problem depended upon court action or regulatory action, and if it were not essential air service or international, we would have to refer that specific problem to the Federal Trade Commission. I believe there are only six court actions

pending with the Civil Aeronautics Board in this particular area, so I don't see the likelihood of having to refer many consumers or group of consumers to the Federal Trade Commission.

Mr. MINETA. What rulemaking authority is there for lost baggage determination?

Mrs. DOLE. Well, the Federal Trade Commission would inherit that authority.

Mr. SCOCOZZA. Mr. Chairman, the domestic baggage regulation and other consumer regulations would live at the Federal Trade Commission.

Mrs. DOLE. They would enforce it.

Mr. SCOCOZZA. The international regulations would be continued by the Department of Transportation.

Mr. MINETA. Let's go back, then, to my question where we have different segments of a flight. A passenger starts out as a passenger on an essential air service flight, and then becomes a passenger on an ordinary domestic flight, where do I go to complain about my lost baggage? The FTC? DOT?

Mr. SCOCOZZA. To the Department of Transportation, Mr. Chairman, to the DOT Office of Consumer Affairs.

Mr. MINETA. Whose rules apply?

Mr. SCOCOZZA. We will take care of that consumer's complaint from the beginning to the end. It may be a matter of calling Garuda Airlines to try to find that particular passenger's baggage, and we at the Department of Transportation will do that. Or if it involved Delta Airlines on a domestic segment, we would try to assist that consumer by calling Delta.

Now if resolving that specific consumer's problem required court action or regulatory action and if it were a domestic segment, we would have to refer them to the Federal Trade Commission.

There is case law and accepted precedent at the Civil Aeronautics Board which will still live in terms of who is responsible for the bag. I believe the last carrier to touch the bag is responsible, or I may have that reversed, and I beg your indulgence, because I'm not that familiar with it. But if the first carrier was responsible for the bag and if it was an essential air service segment, DOT would go to. If it's the last carrier and it was a domestic non-EAS segment, then we would have to refer that to FTC.

Mr. MINETA. It seems to me in that instance that you are citing, that that is fine for determining whose liability it is, the last person to touch the bag or whatever the rule might be. But what about the rules that govern who has jurisdiction over the consumer protection responsibility as it moves from EAS to ordinary domestic carrier and on to, let's say, an international carrier?

Mr. SCOCOZZA. Mr. Chairman, are you asking who is responsible for maintaining a uniform, consistent baggage rule for all passengers everywhere?

Mr. MINETA. That's it.

Mr. SCOCOZZA. I would defer to the General Counsel, but I believe we would enter into a memorandum of understanding with the Federal Trade Commission. We would establish a cooperative agreement to make sure that all baggage rules and matters of split jurisdiction were

absolutely consistent. Obviously, we would not impose onerous regulations on essential air service carriers that domestic airlines were not subject to.

Mr. MINETA. What I guess I'm saying is, wouldn't it be easier to just have that in one place by law?

Mrs. DOLE. Mr. Chairman, if in your wisdom you feel it ought to be put in one place, I believe FTC would be the appropriate place to put it, rather than the Department of Transportation.

You know, we have laid out how we feel we can go forward quickly and efficiently to sunset CAB and to incorporate in an efficient manner those functions that remain.

I do feel that the plan we have laid out has a lot to say for it in not requiring additional legislation. Nor does it raise matters that I feel we can handle very smoothly with a memorandum of understanding with the FTC. We do this constantly working with other agencies and departments.

But if the Congress in its wisdom wants to go forward in that manner, I would suggest that the FTC is the appropriate place for those functions to be housed as a unit, rather than the Department.

Mr. OBERSTAR. Would the Chairman yield?

Mr. MINETA. Mr. Oberstar?

Mr. OBERSTAR. That response just underscores the concern that I was raising earlier.

Imagine my uncle Frank, who hasn't taken many air flights. On the first one he takes, he is placed in a smoking section. He gets asthma from that, and he's choking, and his suitcase is left in Cleveland because this was a one-stop flight. He doesn't get it back. I tell him, "Now you go down, you see our friendly folks at DOT."

He gets down there, and he doesn't know where in the dickens it is. He comes from a little town of 6,000 people. DOT tells him, "Well, now that's all well and good, but the real problem that you have, you've got to go over to the FTC. We've got a memorandum of understanding."

How's he going to find his way around this town?

Mrs. DOLE. As I mentioned sometime back, we would handle all the casework on that matter. I don't think we'd have to send him over to the FTC. We could handle that casework for him.

Mr. OBERSTAR. You are going to handle it through the FTC? I look at this summary of an organization chart of CAB functions. We've got things scattered around within the Department. Now it's going to be scattered around other departments and agencies.

Mr. MARQUEZ. No, I don't believe that's what she meant, Congressman.

Mr. OBERSTAR. That's the way it sounded to this ear, trained to listen to these matters.

Mr. MARQUEZ. What we are saying is, on the day-to-day consumer functions, if someone has a concern the Department will handle those day-to-day complaints and try to assist that passenger as well as he or she can be assisted to resolve the problem.

The distinction is, however, that if there has to be an enforcement action taken because the consumer was not satisfied, then if it is an international problem, the Department would pursue that. If it is

a domestic problem, we would refer that individual to the FTC for the problem to be resolved.

As we develop our rules and regulations through the summer——

Mr. OBERSTAR. May I stop you at that point? What is wrong with having that function all entirely within the DOT? Why have to shift someone over to the FTC at that point?

Do you realize how many letters Members of Congress get, exasperated, from people who say, "I have been shifted around from one Government agency to another, and nothing has happened"?

We are trying to find out now, where is that one seat of wisdom and all-suffering solution to consumer problems?

Mr. MARQUEZ. I believe I know exactly what you're saying, Congressman. Maybe the former member of the FTC can address this better than I, but you know that the FTC handles a variety of industries.

Mr. OBERSTAR. It goes on endlessly, too. [Laughter.]

Mrs. DOLE. That is the function of the Federal Trade Commission.

Mr. OBERSTAR. I just expressed the frustration of the little person sitting out in the countryside in Minnesota who sees this great big Government. They're intimidated by these 15-foot doors to begin with. And now you're going to send them around to other agencies?

Mrs. DOLE. The Federal Trade Commission's basic authority, section 5, is to prohibit unfair practices in trade and commerce and unfair methods of competition. Only the airline industry is exempt at this point. So it makes a lot of sense, if you want to put all consumer authority in one agency, not to set it all up in the Department of Transportation, but rather to include the airline industry within the Federal Trade Commission's basic mandate.

As I mentioned earlier, that exemption was provided in 1938 at the time the Civil Aeronautics Authority was established. It was determined that for the present, because of the desire to combine and coordinate all of the functions regarding the aviation industry in one agency, there should be an exception to the FTC Act.

But with the sunset of the CAB, logic and statutory construction and legislative intent seem to point to the fact that the exception would sunset as well. And this function belongs at the FTC.

Mr. OBERSTAR. Madame Secretary, may I just ask about your statement on page 2: "If the committee concludes that legislation is necessary to clarify some aspects of the transfer of functions, I would not be unalterably opposed," is this one of those areas that you would not be unalterably opposed to something that clarifies and simplifies matters for the consuming public and traveling public?

Mrs. DOLE. I feel the right way to approach this is for the Federal Trade Commission to administer domestic consumer protection. Other than EAS, I do not see the grave problems, frankly. I think that this can be resolved, can be managed very smoothly, as we have laid it out.

The legislation that I have in mind would be simply to clarify the basic jurisdictional structure that has been set out. So I would prefer that it be left as we recommended.

Mr. OBERSTAR. I admire your faith in the future.

Thank you, Mr. Chairman.

Mr. MINETA. Let's imagine DOT saying, "We think the lost baggage liability ought to be $1,250," and FTC says, "No, it ought to be $5,000,"

I assume you would just sit there and arm wrestle as to what the amount would be and compromise that out somewhere along the line?

Mr. MARQUEZ. During the development of the regulations during the summer, assuming nothing changed, those issues would have to be addressed cooperatively between DOT and FTC, and I am sure that there would be some——

Mrs. DOLE. It's a bit premature to anticipate all of this today. I think it is something we will work our way through over these coming months.

Mr. MINETA. Mr. Hammerschmidt?

Mr. HAMMERSCHMIDT. Thank you, Mr. Chairman.

I don't want to overdo this subject matter, but I think to clarify the record, I want to go back and revisit air carrier fitness and more specifically financial fitness.

As you know, CAB thoroughly investigates domestic non-EAS carrier fitness in a separate proceeding, and full evidentiary hearings can be conducted as necessary. In fact, the Board's process has weeded out some carriers whose resources were not adequate to begin service.

Frankly I am very concerned that if we merely make fitness one small part of safety certification, it will get lost in the shuffle and will cease to become a viable factor in determining whether a carrier should be permitted to operate.

Do you believe that the FAA air carrier inspectors have sufficient expertise in this area to thoroughly investigate financial fitness, managerial ability, and compliance disposition as it is now done by the CAB?

Mr. SCOCOZZA Mr. Chairman, as I mentioned earlier, I feel comfortable that we already have expertise at DOT in the fitness area. We do participate before Civil Aeronautics Board proceedings at times. In the Office of Policy and International Affairs, there is an Office of Industry Policy whose responsibility it is to monitor the aviation industry, both domestic and foreign.

I feel comfortable that in all fitness proceedings, as we pass judgment on a particular carrier, they will measure up to the same level of competence and safety and fitness as they do today.

Again, we are going to observe very closely the Airline Deregulation Act of 1978 which was silent on domestic fitness. I believe the level of fitness review that the Department of Transportation now undertakes in the domestic area is going to be enhanced to a degree. I mentioned earlier we would be discussing that with the Civil Aeronautics Board, to define the specific procedures and criteria for fitness.

Mr. HAMMERSCHMIDT. As I understood some of your earlier comments, that decision would really be made by an air carrier operations inspector at the safety level.

Is that where the decision would be made?

Mr. SCOCOZZA. The level of scrutiny at the FAA would be the same. I'm sure they would enhance that particular scrutiny in the absence of CAB responsibility for financial fitness. The FAA would make a safety report to the Office of the Secretary. The Office of the Secretary would then be responsible for looking at the particular carrier and determining financial competence before a certificate were issued.

I would suggest, Congressman, in contested fitness cases, there will be the possibility for an adversary proceeding where parties will be

able to present evidence on the record as to why a carrier may not be fit.

Mr. HAMMERSCHMIDT. Well, as it stands now, of course you have certain disciplines in the process—economists, MBA's and people who understand the whole process. It just appears that if you are making that decisionmaking process at an air carrier inspector's level, that you've lost part of the expertise that exists.

Mr. SCOCOZZA. I would say, Congressman, that the air carrier inspector is the appropriate level of review for the specific question of safety. The rest of the Department would have to speak on the financial competence of the particular carrier to make sure at the very minimum that they have the financial competence to respond to safety needs, maintenance requirements, to keep their operation up to the standard of excellence that is expected for the rest of the industry.

Mr. HAMMERSCHMIDT. Well, I don't quite follow.

Mr. SCOCOZZA. I don't see a situation, Congressman, where an air safety inspector would be doing all certifications and issuing an air carrier's certificate. It would be done by the Department of Transportation after the FAA has spoken on safety and after the Office of the Secretary has looked into the financial responsibility and capabilities of the particular carrier.

Mrs. DOLE. As they related to safety. Only as they are related to safety, which is very extensive.

Mr. HAMMERSCHMIDT. Well, that's true. But CAB's fitness determinations not only promote safety, but they protect consumers against unscrupulous and inexperienced operators, which is a basic part of the finding.

In DOT's plan you state that the Department will continue to collect airline industry data after CAB sunsets. In this connection, I would be interested in whether you would continue to collect O&D [origin and destination], and service segment data, as the Board does today?

Mrs. DOLE. That's a rather detailed question, and we should supply that for the record. But let me say that we anticipate obtaining the same kind of data that the CAB obtains now.

Our authority is such that we have very broad responsibility for collecting data. I think we are fully covered in terms of authority in this area, and I would anticipate that we would collect basically the same data.

But I think it's important that we provide the details for you on the record.

Mr. HAMMERSCHMIDT. Fine. We would appreciate that. In other words, you expect to collect the same data. There's no data that you would collect that CAB has not collected?

Mrs. DOLE. I don't anticipate any change there, no.

[Information received follows:]

DOT will continue to collect financial and statistical data now collected by CAB, including passenger origin and destination data and service segment data. However, we plan to utilize proposed changes by CAB which are designated to simplify and reduce reporting forms and the number of reports filed.

Mr. HAMMERSCHMIDT. It is my understanding that a joint DOT/CAB task force has agreed on the types of data which should be

collected by DOT after sunset. Is that what you are going to supply for the record?

Mrs. DOLE. That is still underway. We are working together on that and receiving very good cooperation from the CAB on that.

Mr. HAMMERSCHMIDT. Do you anticipate any problem in convincing OMB that all the data collection recommendations of the task force should be implemented?

Mrs. DOLE. I anticipate no problems with OMB, no.

Mr. HAMMERSCHMIDT. Thank you very much, Mr. Chairman.

Mr. MINETA. Let's go back to the fitness issue. Do I understand you correctly that DOT will provide for an evidentiary fitness proceeding in contested domestic fitness cases?

Mr. SCOCOZZA. We will do that to the extent it is now provided, Mr. Chairman, in the essential air service area. In our international air certifications, we would provide the same level of scrutiny insofar as we can transfer to the Department of Transportation.

Mrs. DOLE. We anticipate that it will be exactly the same as what the CAB does now.

Mr. MINETA. What about for fitness determinations?

Mr. SCOCOZZA. Insofar as there are petitions suggesting that a particular carrier is not fit, we will have to have an on-the-record proceeding to determine the merits of those particular petitions. But, as I mentioned earlier, we are still talking with the Civil Aeronautics Board to define that particular exercise.

Mr. MINETA. As it relates to non-EAS cases?

Mr. SCOCOZZA. For domestic service, for example, Kansas City to Knoxville, we would be delighted to provide that information for the record as soon as we can formulate the specifics.

[The information received follows:]

DOT does not anticipate conducting formal economic fitness hearings for non-EAS domestic air carriers. We do not believe such hearings are necessary for reasons of safety or consumer protection. In the safety area, FAA is fully capable of judging an air carrier's safety fitness under current procedures. In the consumer protection area, we believe that the consumer protection regulations of the Federal Trade Commission will provide adequate protection.

Mr. MINETA. I think what I would like to do is emphasize what I think might have been underlying Mr. Hammerschmidt's question about how do we protect the consumer against inexperienced or unscrupulous operators. That is a fundamentally basic issue. How do we protect people?

We can understand aviation fitness as it pertains to safety. But what about as it relates to the inexperienced operator or the unscrupulous?

[Information received follows:]

The Department's legal analysis concludes that the CAB function of evaluating the economic fitness of carriers to begin or continue domestic service under subsection 401(d) of the Federal Aviation Act of 1958 lapses with the sunset of the CAB January 1, 1985. However, commuter carrier service to EAS-eligible points does remain subject to the "fitness" standard appearing in section 419 of the Act.

Beyond the careful "safety fitness" evaluation made by the Federal Aviation Administration in fulfillment of section 604 of the Act, the Department of Transportation does not believe entry into the domestic airline industry justifies a separate, initial or continuing "economic fitness" test. As to screening out the "unscrupulous" operator, adequate consumer protection regulations, comparable to those applicable to charter operators, should be sufficient to protect consumers

from abuses by new entrants, such as in the case cited by the Committee in earlier hearings on this subject. The lapse of a purely economic fitness test to enter domestic airline service is an appropriate consequence of CAB sunset.

Mr. MINETA. Let me turn to EAS. It would appear that there has been a conscious effort to scatter units of CAB employees into various existing offices at OST, rather than to retain the inherited staff as a single unit within DOT. We have had witnesses in earlier hearings who raised concerns about this, particularly as it applies to the EAS program. One witness said CAB was small enough so that he could take his small town's EAS problem to them and have no problem finding the right people all in the same place and able to make a prompt decision. However, he despaired that if he had to take the same problem to an agency the size of DOT, where responsibility might be divided up into several different offices, he might not be able to find his way.

In your testimony, you seem to deal with that concern by establishing a single Office of Essential Air Service and by having the office report directly to you. However, a closer reading of your plan reveals that while service level, subsidy level, fitness, carrier selection will all be in that Office of Essential Air Service, if the problem is an EAS subsidy payment processing problem, that will be handled by the Assistant Secretary for Administration. If it's an EAS audit problem, that's in the Office of the Inspector General. If it's an EAS legal analysis problem, that's in the Office of the General Counsel, and even if the problem is one of the basic responsibilities of the Office of Essential Air Service, the authority to review all of these decisions is given, according to your testimony, to the Assistant Secretary of Policy and International Affairs, even though the Essential Air Service Office is not that Assistant Secretary's line responsibility.

At this point, I picture our poor witness with this small-town EAS problem hopelessly lost in the DOT corridors like Charlie on the MTA.

Why this tendency to scatter CAB units and responsibilities so widely within DOT?

Mrs. DOLE. Mr. Chairman, that question, I must say, surprises me a bit, because we have tried to retail everything within the Essential Air Service Program. Those other activities you cited are merely support activities. I mean, obviously you are going to provide support from the Office of Administration to the Essential Air Service Office. The General Counsel may also be providing some support. However, the EAS Office, as we see it, comes intact from the CAB. The same functions will be performed. We have regarded that particular function as important enough to establish a special office within the Office of the Secretary for, which I think shows how serious we are about that particular program. We feel it is a very important function, and it should be in a separate unit, rather than going into one of the existing offices. But it is designed to work as a single unit, including the people who have been doing it. Support assistance would be provided as needed from these other offices.

Mr. MINETA. Well, then, can I ask about page 8 of the DOT plan? On page 8, there is a chart dealing with a summary of the organization of CAB functions as they will be handled once they are transferred to DOT. And on the left side column, you have "Function,"

and on the right side, I assume it's the organization within DOT that would be handling that function. That is why I enumerated these examples of service level, subsidy level, fitness and carrier selections, that that is in the Office of Essential Air Service.

Mrs. DOLE. And that would be the one contact point for the person coming to DOT with a problem.

Mr. MINETA. And if it deals with audits of essential air service problems, then it is handled in the Inspector General's office.

Am I misreading the chart?

Mr. SCOCOZZA. Mr. Chairman——

Mr. MINETA. What about legal analysis as it relates to essential air services?

Mrs. DOLE. The consumer has one point of contact. The other activities are merely support functions.

But, Jim, do you want to speak from the legal side as to the details of how that would materialize?

Mr. MARQUEZ. To add to what the Secretary is saying, basically the core of the office—service level, subsidy level, fitness and carrier selection—is intact. Other activities are support services.

For example, when you bring the CAB over to the Department of Transportation, the Department of Transportation already has an administrative system in place.

If you were to bring the CAB over and keep everything intact, it would be just like picking up CAB from one place and putting it somewhere else. The purpose of this type of organizational structure is to maximize the advantages of the different administrations within the Department, that are already in place to provide these support services. You have the Inspector General to go out and do the audits, if there is a question about the audits. You already have an Assistant Secretary for Administration. He has in place the responsibilities and the wherewithal to handle administrative matters.

So these are, in a sense, support services.

Mr. SCOCOZZA. Mr. Chairman, I might also interject that at the Civil Aeronautics Board the Controller is the one who is responsible for subsidy payment processing. It's not the Essential Air Service Office. The arrangements of support functions is similar in the Office of the Secretary of the Department of Transportation. For example, we don't have a Chief Counsel in each OST element. There are no attorneys in my office. There are no attorneys in the Assistant Secretary for Administration. All of the client support, all of the legal analysis, is done by the Office of the General Counsel.

Mr. MINETA. Mr. Hammerschmidt?

Mr. HAMMERSCHMIDT. If the gentleman will yield, I want to refer also to page 8 of the DOT plan, where on the lefthand side it says, "Function: Fitness determination for domestic air service except EAS," then the organization handling it, "FAA."

Let me use as an example a recent incident that was announced by the Civil Aeronautics Board News Bulletin, and I will read it briefly here if you will indulge me:

Consumers ought to get their money back under the terms of a consent judgment which the CAB obtained against Hawaiian Pacific Airlines in Federal Court today. The judgment requires Hawaiian Pacific and Kevin von Feldt as President

to refund the passengers dollar for dollar all money collected for transportation on HPA for a total of more than one million dollars. Under the permanent injunction granted by the court, the defendant must cancel all advertisements and materials which deal with air transportation, cancel all contracts for air transportation, notify each person under contract of the cancellations, giving the court an accounting of all money received from passengers or shippers for transportation and make full refunds to all passengers of all money collected for transportation on HPA.

Of course that's an example of protecting the consumer under the fitness rule. And what I think we still have concern about is whether FAA with a safety inspector would have the judgment and would they pursue that to the benefit of the consumer as CAB has.

I just want to continue to express our concern about that area.

Mr. SCOCOZZA. I appreciate that, Congressman.

Mrs. DOLE. Thank you.

Mr. MINETA. If there are no further questions, Madame Secretary, let me again thank you for your appearance here today, as I said before, 2 days in a row before the Committee on Public Works and Transportation. It's a big load. And again, I think I can express this on behalf of the members of this committee, we have a great deal of confidence in your ability. But there are issues that we just want to make sure are clearly understood in terms of where those lines are, about where we may have some differences.

As in any hearings, these are to try to come to what is our understanding of what the Department is planning to do. But some of it may be our own misunderstanding as to what is contemplated.

So again, we ask these questions not to be harassing in any way or to be argumentative, but for informational purposes.

Mrs. DOLE. Very good.

Mr. MINETA. Again, Madame Secretary, Mr. Scocozza, Mr. Marquez, we are very appreciative.

Mr. HAMMERSCHMIDT. Mr. Chairman, may I join in expressing our appreciation for Secretary Dole for the fine job she does?

Thank you so much.

Mr. MINETA. She does indeed. Thank you very much.

Mrs. DOLE. Thank you.

Mr. MINETA. The subcommittee will recess until 2 p.m. We will reconvene at that point with our other witnesses.

[Whereupon, at 12:30 p.m., the subcommittee recessed, to resume at 2 p.m.]

AFTERNOON SESSION

Mr. MINETA. The Subcommittee on Aviation will please come to order.

We are pleased to have a great Californian with us this afternoon, the Honorable Dan McKinnon, who chairs the Civil Aeronautics Board.

Mr. Chairman, the full text of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

STATEMENT OF

CHAIRMAN DAN McKINNON

CIVIL AERONAUTICS BOARD

Before the House Committee on Public Works and Transportation
Subcommittee on Aviation

February 29, 1984

Good morning, Mr. Chairman and Members of the Subcommittee. I'm pleased to be here at your request, to give you our views on how the CAB's programs should be administered after sunset.

Some hard questions are being faced by your subcommittee, by other committees, and by DOT and other agencies.

The Board's time is running out. You requested our frank opinion on some of the sunset issues, so here they are.

As you know, the issues involved in CAB sunset are complex, and have shifted over time.

Three years ago, the Board drafted and presented a major bill to tie up all the loose ends left by the 1978 Deregulation Act.

Other agencies and organizations including this committee did too.

Last year I personally suggested a draft bill for that purpose.

This year, however, the thinking has centered on how things should be done if there is no legislation at all. And most recently there has also arisen the possibility of a "short bill."

As the agency that has been closest to these aviation matters for 46 years, but one that's now going out of business, our attitude is to point out the unfinished business of sunset and to share with you, from our many years of experience, what we think is the best way to cope with those problems.

DOT has given us its organizational plan, and our senior staffers have been going over it in detail with them.

It's no secret that the Board in the past, and I quite recently, has said that a single, integrated aviation unit within DOT -- whether it is in the form of an Office, or an Administration, -- would be the most efficient and effective way to handle the continuing aviation programs.

DOT knows DOT best.

They have taken a different approach, spreading the activities over many, mostly existing offices within the Office of the Secretary. If they think that will serve the public and aviation industry the best -- we'll work to make it function.

Our concern now is to give the best advice and suggestions we can to make the plan work.

The issue that has received the most attention is insulation of the decisionmaker in formal proceedings, from political and other outside influences.

I'd like to dispel two common misconceptions about the problem.

The first is that insulation concerns, or gets in the way of, talking about overall policy.

It does not.

Anyone -- the President of the United States, the president of United Airlines, or anyone else -- can talk to me or other Board Members about policy.

What they cannot do, is talk about a particular case before us.

Whatever the structure after sunset, the system must be designed so that once the proceeding begins, the decisionmaker does not receive outside input about things that bear on that particular decision, except through the channels of the case itself.

The Department, of course, is free to appear in the case as a party and to represent its own view of how it should be resolved.

Equally important, the decisionmaker must be insulated against reprimands or reprisals after the case is decided.

The second misconception is that international carrier selection cases are the only ones that need to feed into an insulated procedure.

Any case where the Department sits as a judge -- between parties fighting over a decision that will benefit or hurt them directly -- should be insulated.

Rate cases,

enforcement decisions,

employee protection cases, and

contested carrier selections in essential service

are other examples.

I feel especially strongly that essential air service must not be politicized.

If it is, the cost to the taxpayer will soar. We're very proud that we've accomplished the goals of the essential air service program while bringing down airline subsidy costs from $121 million in 1981 to 52 million dollars in 1985.

The decisional steps can be simple -- we seldom need oral hearings, for example -- but the basic insulation must be there in some form.

Bluntly speaking, it has been my personal experience that there are political efforts to influence CAB EAS decisions. International, too. I have several examples of direct congressional efforts in mind right now.

Lobbying is a fully accepted game of hardball in this country -- tens of millions dollars per year are spent on it.

The rule for high-stakes players is, if you're allowed to do it, you must do it. If we don't want it in a particular area, we have to rule it out.

As to the DOT plan in particular, they have come up with a novel idea for international decisions: a single, civil-service decisionmaker who will make the decisions the Board makes now, on the basis of records and recommended decisions created by the administrative law judges.

I trust the decision maker will have the protections I've already mentioned.

A majority of the Board has two specific suggestions with regard to this idea.

First, this insulated decisionmaker needs an equally insulated staff to analyze records and to help write opinions. It needn't be a large staff -- perhaps something like two to four professionals. But in our judgment this is more than a one-person job. This kind of staff must participate in the innermost mental processes of the decision -- for practical purposes, it is <u>part</u> of the decisionmaker.

For the supposedly insulated deciding official to have to look to an uninsulated office, such as the General Counsel's Office, for advice and support could undercut the appearance of objectivity. This is particularly true when you consider that that office will be advising the reviewing official on the same matter, which in this case is either the Assistant Secretary or the Secretary.

Second, while the policy offices are and should be free to discuss general policy with the deciding official, as they are today, they should not be the ones to set the criteria for decision in a particular case. The deciding official should do that. (These criteria usually are set in what we call an instituting order.)

The reason is that in many, maybe most cases, if you let me write the criteria into the instituting order, I can make the case come out any way you want.

To take an easy example, if People Express were to compete with United for a foreign route, I could make it come out one way by saying low fares will be the main consideration, or the other way by saying connecting feed will be.

In a real case, the biasing would probably be more subtle, but the effect would be the same.

One additional comment I have on the DOT plan does not have to do with insulation, but with the other work, the informal matters. Because this work does not, except for big rulemakings, get the publicity of the formal decisions, DOT may not understand that this is the majority of the work. It also requires a great degree of expertise.

My point here is a note of caution. The most concentrated expertise and institutional memory at the Board (like other organizations) is in its middle and upper management -- its supervisors.

The danger in scattering functions over existing offices in a receiving agency is that this priceless asset can be underused -- in some cases even thrown away.

This will be a difficult and sensitive management problem. I don't have the answers, except to alert DOT to the danger of the loss of this expertise and hope that they insure that the Board program managers receive an appropriate level of influence over transferring functions.

Next I'd like to talk about some other substantive issues. There were two big gaps left by the 1978 Act.

The first one is the broad area of unfair and deceptive practices, unfair methods of competition, (both under section 411) and safe and adequate service (section 404(a)).

This is sometimes misleadingly called "consumer protection" -- actually it's at least as much carrier protection in many cases.

It includes our rules on smoking, baggage liability, oversales, charters, and notice of contract terms.

It includes enforcement against deceptive advertising and other abusive practices.

Last but certainly not least, it includes our massive proceeding on computer reservations system abuses.

The problem is that sections 404 and 411, while left in the Act, have no agency with specific authority to enforce them in domestic non-EAS air service next year, since the Act only gives foreign air and essential air service supervision to DOT, domestic postal matters to the Postal Service, and agreements and mergers to Justice.

DOT has suggested, in a General Counsel's opinion, that the Federal Trade Commission, whose jurisdiction has an exception for airlines regulated by the Federal Aviation Act, can take over unfair trade practices in the domestic area when the Board's Regulatory Authority disappears.

As it turns out, however, we understand that the Federal Trade Commission does not agree with this opinion. We are not experts on the Federal Trade Commission Act, but we do believe that the FTC has the final word on this issue until it is decided by the Courts.

I strongly feel the Congress needs to be specific about the continuation of the provisions of section 411 to insure any rules we adopt on CRS remain effective after the sunset of CAB.

We see other problems with the FTC solution.

First, the FTC jurisdiction in the scenario would only cover unfair or deceptive practices in service that was

(a) purely domestic, and

(b) not part of essential air service.

But since there is no hard definition of what is essential air service, or even foreign air service, the scope of the FTC's coverage would at best be unclear.

Second, the FTC must use a slow and cumbersome rulemaking procedure, with advance notices and formal, cross-examination hearings for much of what they do.

In aviation regulation, we often have to move fast to let the industry do what they need to do or to protect the public. For example, could the FTC make an expedited amendment, or grant a quick telephonic exemption from a charter rule to let an unusual program take to the air? It's unclear, based on our understanding of FTC's operational procedures.

Finally, the FTC would not receive the safe-and-adequate-service jurisdiction, which includes at least the smoking rules.

To state it simply, there is a problem here.

We recognize and sympathize with the reasons for trying to make the system work with no legislation.

Some people might say -- and the Board itself probably has varying opinions here -- that we could do without some of the rules, at least as an experiment.

Personally, I shudder at the idea of anybody being able to set himself up as a charter operator, run ads, collect millions of travel dollars, with no rules and no supervision. Many in the charter industry shudder at it, too.

And the airline executives are concerned at the thought of what 50 different State legislatures might say about how they should give contract notice to passengers, or maybe what State courts might say about the reasonability of their baggage liability limitations.

One set of Federal rules has standardized those problems for the entire nation.

But on one subject there can be no doubt.

How we deal with computer reservation systems is going to affect the shape of the industry for years to come. It is the single most important factor affecting deregulation.

The whole great experience of deregulation depends on vigorous competition with free entry, free pricing, and free access to the public.

We are in the process of deciding this issue -- so I won't speak on the merits. But if we decide that rules are needed, we'll all be faced with the momentous question of what happens to those rules at the end of 1984.

For all these reasons, a majority of the Board favors placing the authority to govern air transportation, domestic and foreign, in one agency. And that the only agency that reasonably can take that responsibility, after the CAB, is the Department of Transportation. This includes anti-trust immunity.

Another subject on which I've come to feel very strongly in my tenure as Chairman since 1981 is our work in determining the fitness of carriers to operate.

This involves checking their management ability, their financial resources, and most importantly the likelihood that they will obey the law and run a responsible, safe operation.

This is quite different from what the FAA currently does.

We don't check their technical preparations.

We look into their books and their backgrounds -- our review is necessarily broad.

When the big influx of new carriers began in 1979, they almost all were found honest and competent.

Many of the Board's staff felt that the fitness work was not worth the cost because almost everybody passed.

We feel differently now about our fitness function.

Then, about 1981, some came to realize that the airline business offered more than just the chance to make -- or lose-- an honest buck.

It offered a lovely way to launder money or to run drugs or to just operate fast and loose with consumer funds and industry confidence.

We started to receive and reject applications from some very questionable operations.

The number isn't great, maybe a dozen rejections or so; but they raised questions about organized crime, drug involvement, perennial insolvents, mental instability and undoubtedly some unfit carriers were scared away by the process.

Fitness screening under deregulation is more important than ever to the welfare of the traveling public, and it should be continued.

A majority of the Board favors continuation of the domestic fitness function.

This decision on fitness should be made soon.

It takes about 6 months to process a fitness case, given our backlog now.

If no agency is going to continue the fitness requirement, there's no point in our taking any more applications beginning July 1.

However, such a result would not be in the best interests of the tra eling public.

If the Congress is going to do anything about fitness, it's important it make its intentions clear soon.

Finally, the subject of people -- the people who will be carrying on the work of aviation regulation in new surroundings.

Attrition has reduced our staff from over 800 in 1979 to about 400 permanent employees today. Planned retirements, jobs to be abolished at sunset, and those transferring to agencies other than DOT we believe will account for reduction of over 100 of those people remaining. And of course attrition will continue, though we can't predict at what rate in this last year. So our best estimate is that less than 300 people may transfer to DOT.

We don't think any case can be made that the number transferring will be too many for the work to be done.

We're lean, for our own operation; we're downright anemic for a new structural framework that prevents informality and overlapping of responsibilities. You see lots of handwritten memos around our place now -- being delivered by the people who wrote them.

In some areas you'll find backlogs growing, despite our best efforts.

A lot of our tasks are more complex than they look. From the outside, or from before deregulation and IATCA.

Take a rate renegotiation for an essential air service carrier.

Five months ahead, our market data people supply traffic data to an analyst, who reviews the service level.

If it has to be changed, the analyst drafts an order, reviewed by a lawyer.

Our community representatives stay in contact with the community to be sure their views are known.

Then a service and a subsidy analyst sit down with the carrier to renegotiate the rate.

Our data analysts supply cost data, which may be reviewed by our auditors.

When agreed on, the analyst prepares a show-cause order.

Other carriers answer, trying to get the route.

Analysts similarly check the data they submit.

We confer with each applicant.

We write to the community, and our community representatives again work to be sure the community views are presented.

Then we draft an order selecting a carrier and setting a rate -- again reviewed by lawyers for legal sufficiency.

The Comptroller's Office reviews the payout formula, and specifies a billing format.

We do around 40 of these each year.

We audit billings to be sure the goverment isn't overcharged. In the last 3 years these and other such audits have saved taxpayers nearly $5 million.

Our field auditing staff is down from 16 to 8.

I can't imagine what kind of sense it would make to try to eliminate or cut that operation.

That's just one aspect of the work in essential air service.

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The international area is equally complex -- with an even greater variety. The tasks require teams of people with different skills, and the volume, especially of the informal work, is high.

Another area that needs special attention is data collection. There are wise efforts to eliminate paperwork -- but it's important that not so much valuable information is lost that manufacturers lose the information they need to build the next generation of aircraft.

The industry just can't collect some of that data. Incidentally, speaking of paperwork there is a law Congress passed that limits foreign ownership of a United States airline to 25 percent.

It was probably passed with a good reason in mind, including having an airline fleet you could count on in times of national emergency.

Yet there will be no organization that will have oversight over that law.

While we're discussing miscellaneous subjects, I'd like to emphasize the importance of the CMI decision in making a deregulated airline system work in the years to come. I hope this committee will exercise the wisdom to allow the CAB decision to stand.

I also agree with you on tough scrutiny involving all factors affecting safety.

When you consider whether to make permanent the temporary 5-year CAB interim route authority to carriers, its the Board's considered opinion that such action would be unwise.

We've found keeping such authority temporary keeps the carrier sensitive to consumer needs for fear of non-renewal.

We've always been proud of our work. The CAB has a long record of success, in doing what Congress asks of it. We're proud of the people we've been able to attract. Several of them are running major airlines now; others are in key positions in leading law firms and corporations.

It's still a class outfit.

I know personally that the people we send to DOT, Justice, and elsewhere will do a first-rate job for their new employers -- at whatever tasks they are given. That is our pledge to the Administration, to the Congress, to the industry and to the American people.

Thank you. I'll be glad to answer any questions.

Mr. MINETA. Please proceed.

TESTIMONY OF HON. DAN McKINNON, CHAIRMAN, CIVIL AERONAUTICS BOARD, ACCOMPANIED BY JOHN COLEMAN, DIRECTOR, BUREAU OF DOMESTIC AVIATION; AND DICK DYSON, ASSOCIATE GENERAL COUNSEL

Mr. MCKINNON. Mr. Chairman, we are happy to be here this afternoon at your request to give some of our views on how the CAB program should be administered after sunset.

As we get underway, I would like to acknowledge the presence of Board Member Jim Smith, who is here, who has been a longtime Board member. I don't know if any of the others got back. Gloria Schaefer was here earlier. I don't believe Diane Morales was able to make it, and Member McConnell is on the way to China for some very severe negotiations we're having over there. That completes our Board members.

I would like to point out in dealing with a 5-member Board, as you deal with a group of 435, you don't always get everything you want the way you want it to go all the time, so I am sort of representing the by and large majority opinion, although the majority sort of slips around at different times. Sometimes the majority is not composed of the same people all the time.

At any rate, you asked some hard questions that are being faced by your subcommittee and other committees of the Congress and by the Department of Transportation and other agencies.

The Board's time is running out. You requested our frank opinion on some of the sunset issues, so here they are.

As you know, the issues involved in CAB sunset are complex and have shifted over time. Three years ago, the Board drafted and presented a major bill to tie up all the loose ends left by the 1978 Deregulation Act. Other agencies and organizations, including this committee, did, too.

Last year, as you know, I personally suggested a draft bill for that purpose. This year, however, the thinking has centered on how things should be done, if there is no legislation at all. And most recently there has arisen the possibility of a so-called short bill.

As the agency which has been closest to these aviation matters for 46 years, but one that is now going out of business, our attitude is to point out the unfinished business of sunset and to share with you from our many years of experience what we think is the best way to cope with those problems.

DOT has given us its organizational plan, and our senior staffers have been going over it in detail with them. It's no secret that the Board in the past—and I quite recently—have said that a single, integrated aviation unit within DOT, whether it is in the form of an office or an administration, would be the most efficient and effective way to handle the continuing aviation programs.

DOT knows DOT best, however. They have taken a different approach, spreading the activities over many, mostly existing offices within the Office of the Secretary. If they think that will serve the public and aviation industry the best, we will work to make it happen.

Our concern now is to give the best advice and suggestions we can to make the plan work.

The issue that has received the most attention is insulation of the decisionmaker in formal proceedings from political and other outside influences. I would like to dispel two common misconceptions about the problem.

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The Department, of course, is free to appear in the case as a party and to represent its own view of how it should be resolved.

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The second misconception is that international carrier selection cases are the only ones that need to be fed into an insulated procedure. Any case where the Department sits as a judge between parties fighting over a decision that will benefit or hurt them directly should be insulated, such as: Rate cases, enforcement decisions, employee protection cases, and contested carrier selections in essential air service. Those are examples, and there are others.

I feel especially strongly that essential air service must not be politicized. If it is, the cost to the taxpayer will soar. We are very proud that we have accomplished the goals of the essential air service program while bringing down airline subsidy costs from $121 million in 1981 to $52 million in 1985.

The decisional steps can be simple. We seldom need oral hearings, for example, but the basic insulation must be there in some form.

Bluntly speaking, it has been my personal experience that there are political efforts to influence CAB FAS decisions. International, too. I have several examples of direct congressional efforts in mind right now. Lobbying is a fully acceptable game of handball in this country. Tens of millions of dollars per year are spent on it. The rule for the high stakes player is, if you're allowed to do it, you must do it. If we don't want it in a particular area, we have to rule it out.

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First, this insulated decisionmaker needs an equally insulated staff to analyze records and to help write opinions. It need not be a large staff, perhaps something like two to four professionals, but in our judgment, this is more than a one-person job. This kind of staff must

participate in the innermost mental processes of the decision. For practical purposes, it is a part of the decisionmaker.

For the supposedly insulated deciding official to have to look to an uninsulated office, such as the General Counsel's Office, for advice and support could undercut the appearance of objectivity. This is particularly true when you consider that that Office will be advising the reviewing official on the same matter, which in this case is either the Assistant Secretary or the Secretary.

Second, while the policy offices are and should be free to discuss general policy with the deciding official, as they are today, they should not be the ones to set the criteria for decision in a particular case. The deciding official should do that. These criteria usually are set in what we call an instituting order.

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Next I would like to talk about some other substantive issues.

There were two big gaps left by the 1978 act. The first one is the broad area of unfair and deceptive practices, unfair methods of competition, both under section 411, and safe and adequate service under section 404(a). This is sometimes misleadingly called consumer protection. Actually it is as much carrier protection in many cases. It includes our rules on smoking, baggage liability, oversales, charters, and notice of contract terms. It includes enforcement against deceptive advertising and other abusive practices, and, last but certainly not least, it includes our massive proceedings on computer reservation system abuses.

The problem is that sections 404 and 411, while left in the act, have no agency with specific authority to enforce them in domestic non-EAS service next year, since the act only gives foreign air and essential air service supervision to DOT, domestic postal matters to the Postal Service, and agreements and mergers to Justice.

DOT has suggested, in its General Counsel's opinion, that the Federal Trade Commission, whose jurisdiction has an exception for airlines regulated by the Federal Aviation Act, can take over unfair trade practices in the domestic area when the Board's regulatory authority disappears.

As it turns out, however, we understand that the Federal Trade Commission does not agree with this opinion. We are not experts on the Federal Trade Commission Act, but we do believe that the FTC has the final word on this issue until it is decided by the courts.

I strongly feel the Congress needs to be specific about the continuation of the provisions of section 41 to insure any rules we adopt of CRS remain effective after the sunset of the CAB.

We see other problems with the FTC solution. First, the FTC jurisdiction in the scenario would only cover unfair or deceptive practices in service that was either purely domestic and not part of the essential air service program. But since there is no hard definition of what is essential air service or even foreign air service, the scope of the FTC's coverage would at best be unclear.

Second, the FTC must use a slow and cumbersome rulemaking procedure with advance notices and formal cross-examination hearings and much more in the process of what they do. In aviation regulation, we often have to move fast to let the industry do what they need to do to protect the public.

For example, could the FTC make an expedited amendment or grant a quick telephonic exemption from a charter rule to let an unusual program take to the air? It's unclear, based on our understanding of the FTC's operational procedures.

Finally, the FTC would not receive the safe and adequate service jurisdiction, which includes at least the smoking rules. To state it simply, there is a problem here.

We recognize and sympathize with the reasons for trying to make the system work with no legislation. Some people might say—and the Board itself probably has varying opinions here—that we could do without some of the rules, at least as an experiment. Personally, I shudder at the idea of anybody being able to set himself up as a charter operator, run ads, collect millions of dollars in travel dollars with no rules and no supervision. Many in the charter industry would shudder at it, too. And the airline executives are concerned at the thought of what 50 different State legislatures might say about how they should give contract notice to passengers or maybe what State courts might say about the reasonability of their baggage liability limitations.

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But on one subject there can be no doubt. How we deal with the computer reservation systems is going to affect the shape of the industry for years to come. It will involve billions of dollars. It is the single most important factor affecting deregulation.

The whole great experience of deregulation depends, on vigorous competition with free entry, free pricing, and free access to the public. We are in the process of deciding this issue. It's on the Board agenda tomorrow, so I won't speak on the merits. But if we decide that rules

are needed, we will all be faced with the momentous question of what happens to those rules at the end of this year.

For all these reasons, a majority of the Board favors placing the authority to govern air transportation, domestic and foreign, in one agency, and that the only agency that can reasonably take that responsibility after the CAB is the Department of Transportation. This includes antitrust immunity.

Another subject on which I have come to feel very strongly in my tenure as Chairman since 1981 is our work in determining the fitness of carriers to operate. This involves checking their management ability, their financial resources, and, most importantly, the likelihood that they will obey the law and run a responsible, safe operation.

This is quite different from what the FAA currently does. We don't check their technical preparations. We look into their books and their backgrounds. Our review is necessarily broad.

When the big influx of new carriers began in 1979, they almost all were found honest and competent. Many of the Board's staff felt that the fitness work was not worth the cost because almost everybody passed.

We feel differently now about our fitness function. About 1981 some came to realize that the airline business offered more than just the chance to make or lose an honest buck. It offered a lovely way to launder money or to run drugs or to just operate fast and loose with consumer funds and industry confidence. We started to receive and reject applications from some very questionable operators. The number isn't great, maybe a dozen rejections or so, but they raised questions about organized crime, during involvement, perennial insolvents, mental instability and undoubtedly some unfit carriers were scared away by the process.

Fitness screening under deregulation is more important than ever to the welfare of the traveling public, and it should be continued. A majority of the Board favors continuation of the domestic fitness function. This decision on fitness should be made soon. It takes about 6 months to process a fitness case, given our backlog as it is now.

If no agency is going to continue the fitness requirement, there is no point in our taking any more applications after July 1. However, such a result would not be in the best interest of the traveling public.

If the Congress is going to do anything about fitness, it is important that it make its intentions clear soon.

Finally, the subject of people. The people will be carrying on the work of aviation regulation in new surroundings. Attrition has reduced our staff from over 800 in 1979 to about 400 permanent employees today. Planned retirements, jobs to be abolished at sunset, and those transferring to agencies other than DOT, we believe will account for reduction of over 100 of these remaining people. And of course attrition will continue, although we can't predict at what rate in this last year. So our best estimate is that less than 300 people may transfer to DOT.

We don't think any case can be made that the number transferring will be too many for the work to be done. We are lean for our own operation. We are downright anemic for a new structural framework that prevents informality and overlapping responsibilities. You see lots of handwritten memos around our place now, being delivered by

the people who wrote them. In some areas you will find backlogs growing, despite our best efforts.

A lot of our tasks are more complex than they look from the outside or from before deregulation and IATCA. Take a rate negotiation for an essential air service carrier. Five months ahead, our market data people supply traffic data to an analyst who reviews the service level. If it has to be changed, the analyst drafts an order, reviewed by a lawyer. Our community representatives stay in contact with the community to be sure their views are known. Then a service and a subsidy analyst sit down with the carrier to renegotiate the rate. Our data analysts supply cost data which may be reviewed by our auditors. When agreed on, the analyst prepares a show-cause order. Other carriers answer, trying to get the route. Analysts similarly check the data they submit. We confer with each applicant. We write to the community and our community representatives work again to be sure the community views are presented. Then we draft an order selecting a carrier and setting a rate, again reviewed by lawyers for legal sufficiency.

Finally, the Controller's Office reviews the payout formula and specifies a billing format. We do about 40 of these a year.

We audit billings to be sure the Government isn't overcharged. In the last 3 years, these and other audits have saved taxpayers nearly $5 million. Our field auditing staff is down from 16 to 8. I can't imagine what kind of sense it would make to try to eliminate or cut that operation.

That's just one aspect of the work in essential air service.

The international area is equally complex with an even greater variety. The tasks require teams of people with different skills and the volume, especially in the informal work, is high.

Another area that needs special attention is data collection. There are wise efforts to eliminate paperwork, but it's important that not so much valuable information is lost that manufacturers lose the information they need to build the next generation of aircraft. The industry just cannot collect some of the data.

Incidentally, speaking of paperwork, there is a law that Congress passed that limits foreign ownership of a U.S. airline to 25 percent. It was probably passed with good reason in mind, including having an airline fleet you could count on in times of national emergency. Yet after sunset there will be no organization that will have oversight over that law.

While we are discussing miscellaneous subjects, I'd like to emphasize the importance of the CMI decision in making a deregulated system work in the years to come. I hope this committee will exercise the wisdom to allow the CAB decision to stand.

I also agree with you on tough scrutiny involving all factors affecting safety, including inspections. When you consider whether to make permanent the temporary 5-year CAB interim route authority to carriers, it's the Board's considered opinion that such action would be unwise. We have found keeping such authority temporary keeps the carrier sensitive to consumer needs for fear of nonrenewal.

We have always been proud of our work. The CAB has a long record of success in doing what Congress asks of it. We are proud of the people we have been able to attract. Several of them are now run-

ning major airlines. Others are in key positions in leading law firms and corporations. It's still a class outfit.

I know personally that the people we send to DOT, Justice, and elsewhere will do a first-rate job for their new employers at whatever tasks they are given. That is our pledge to the administration, to the Congress, to the industry, and to the American people.

Thank you, Mr. Chairman and members of the committee. I will be glad to answer any questions you might have.

I would also like to recognize that Member Schaefer has arrived. I am glad to acknowledge her, and with me here at the table I have John Coleman, head of the Bureau of Domestic Aviation, and Dick Dyson, Associate General Counsel in Charge of Rules and Legislation.

Mr. MINETA. Thank you very much, Mr. Chairman.

First, I would like to explore the issue of insulation with you. On page 206 of the Board's report to Congress, the Board states that the majority believes that there is, "a definite need for insulation from chain-of-command pressure in a postsunset executive agency."

The CAB majority goes on to state that the official making decisions must have independence and tenure, freedom in a term appointment from having to take orders from above with respect to the decision in question or risk of firing or other adverse personnel actions against—or actions because of them.

Do I understand correctly that the Board majority believes that the DOT decisionmaking official should have tenure in office?—That is, that he or she should have a guarantee that he or she will continue in the decisionmaking position for a specified period of time unless guilty of malfeasance?

Mr. MCKINNON. Mr. Chairman, I believe, as you read through our report to the Congress, we didn't refer to DOT in it. We just said that in the future—there's basically five areas: Independence in tenure, openness of the decisionmaking process, the finality of it, irreversibility of that decision, and also resource controls are very important, to be able to not just hire but to manage the staff and also the budgeting process of that staff, so you have control and you don't have that type of influence.

So these were things that we thought were important in the process.

Mr. MINETA. As I understand DOT's testimony today, they do not propose to give this type of tenure to the senior civil servant who would be making decisions. So it seemed to me that in this respect, the DOT proposal does not live up to the CAB's recommendation.

Do you agree?

Mr. MCKINNON. It is different; yes, sir.

Mr. MINETA. The CAB report also indicates that a majority of the Board believes that for a decisionmaker to be insulated from political pressures, his or her decision must have finality. That is, the decision must not be reversible except on narrow grounds such as are provided in section 801 of the Federal Aviation Act. The DOT plan places no limits on the grounds for review of the senior carrier official's decision by the Assistant Secretary or Secretary. This being the case, would I be correct in concluding that in this respect the DOT plan is inconsistent with the CAB's recommendation?

Mr. MCKINNON. Yes, sir.

Mr. MINETA. Has your experience as a Board member indicated that having decisions made by a Board of several members gives more insulation against improper pressures than having decisions made by a single decisionmaker?

Mr. MCKINNON. There are several aspects to think about on that, Mr. Chairman.

One is, when people come to see me or any member of the Board, they know what the ground rules are. They know, No. 1, we don't talk on the merits of any issue that is before us that affects them.

We also know there are a variety of pressures. There's pressures—there could be conceivably pressures from the top. You think of yourself in a circle. You have arrows pointing from the top down. There's pressure on the civil servant. You have them from the bottom pointing up on the staff. You have them from the Congress on the one side and the lobbyists on the other side.

We are not faced with that at the CAB because of the tenure and the independence that we have grown accustomed to.

We also have a different situation. By having a Board, you are able to sit around a little bit. Not make decisions—they are finally made at a Board meeting or by notation on voting items, but in the process of getting there, you find Solomon's old adage of, "There's wisdom in the counsel of many." Many are fairly helpful. Sometimes the Board members can sit around and talk with each other, and one idea you may have been sold on at one time may change as you get more facts and more input. There is an ability to have more input, even though we can only do it one-on-one without getting a majority of the Board together to discuss it.

I am concerned about DOT's civil servant notion. He may be by himself, unless he has a staff of two or four that I suggest in my testimony. You need to have somebody to be able to sit down and sort of chew it over with to make sure you're going in the right direction. This has been one of the benefits of CAB or independent-type organization that we have been associated with.

I hope I covered the point you are interested in there .

Mr. MINETA. What procedures did the Board use to identify the employees who are associated with transferring functions, and therefore entitled under civil service law to transfer to the agency which will take over those functions?

In your answer, would you also elaborate on how you identified the support personnel who are entitled to transfer as well?

Mr. MCKINNON. Yes, sir.

About 1980, the Board started looking at this. We started analyzing what the law was, and discovered the law said that anybody that's in a—the law and OPM rules said—anybody in a transferring position is going to transfer to DOT at sunset. So that's the accepted background there.

So what do you do? We start identifying the positions that would transfer. These were positions that under the rules and the law said, if more than 50 percent of the work was transferring, those positions transferred. What if the position was only doing 25 percent transferring work? So you might have four people doing 25 percent. That

would give you one position that would transfer. It's somewhat of a mechanical process.

And as we looked at this allocation in 1981, we stopped hiring—in January we stopped hiring people at the CAB, with the exception of just three or four people since that time. So we gradually got down by attrition.

Then people were in transferring positions, the functions that transfer. But we have not picked any individuals to transfer per se. We have picked the positions that are going to transfer. We know what positions we think are involved in continuing functions, so we get those identified, those people in those. Some of those people retire, quit, or leave for one reason or another. We fill those vacant positions, then, instead of hiring from the outside, we took people from the inside and plugged them into those holes. There's been 240 of those happen since that point in time, and we've gradually whittled it down now to where we're down to around 405 people. In 1979, there were 799 people at CAB. When I came there, there were 625. We're down to roughly 405. We think we're going to get down to about 300 by the time a variety of attrition happens.

So that's how we've got it identified, and we've not named the people who are going to go over in the transferring of functions at this point, but we know the positions.

Mr. MINETA. What about support personnel? How did you identify them?

Mr. MCKINNON. Under the rules, it says the support personnel—which are people like in personnel, payroll, the print shop, auditing, and some of these other staff functions—under the rules, it says they must be proportioned on the same percentage basis as the program staff that go over. So we have just allocated that on proportion. If 39 percent were in BIA, then 39 percent of the staff are allocated to go over. If 7 percent of the program people are in nontransferring jobs, then 7 percent of the support staff would not transfer, and they would be out of work at the end of the year.

So those percentages track each other.

Mr. MINETA. Has the number of Board employees identified with transferring functions increased or decreased over the past 4 years?

Mr. MCKINNON. It's gone down over the last 4 years. I'd like to share with you the exact numbers so you might be able to know them for the reocrd.

In 1980, we had 653. In 1981, 596; 1982, 517; 1983, 446. And today, 373. So, the last 4 years or so, it's roughly half the number that are transferring from that time.

Mr. MINETA. Is this transferring functions, or in terms of total employees?

Mr. MCKINNON. Those are in transferring functions, sir. We have more total employees than we have in transferring functions.

Mr. MINETA. Have the Board's responsibilities with respect to these functions changed during this period?

Mr. MCKINNON. We lost our authority over rates and over routes, which was a big area of regulation. Of course, we picked up the EAS program. Fitness has become more of a time-consuming project during this period of time.

Mr. MINETA. Those were areas in which the function just terminated, rather than being transferred somewhere?

Mr. MCKINNON. Routes and rates, yes, sir. I believe we lost authority over routes at the end of 1981 and rates at the end of 1982, although in reality it was phased out a little bit before that. Since we weren't going to have authority, there was no use exercising it.

Mr. MINETA. What about the employees in small community air service? What has happened to them?

Mr. MCKINNON. The employees in small community air services? John, did they go up—they went down, I know that.

Mr. COLEMAN. The total number in the operating bureau in essential air services remained fairly constant. There has been a pretty substantial decrease, though, in the support people that we've used.

Mr. MCKINNON. We'll be happy to supply those exact figures for the record. This whole thing was driven by the budget, Mr. Chairman. That's what sort of controlled that.

Mr. MINETA. Please also provide the figures for those transferring functions as well.

Mr. MCKINNON. Right. As I identified today, we have 373.

[Information received follows:]

REDUCTION IN BUDGET AND SUNSET EMPLOYMENT FIGURES SINCE 1980

FUNCTIONS	DISPOSITION	Budget 9-30-80	Sunset 3-19-81	Budget 9-30-81	Sunset 12-15-81	Budget 9-30-82	Sunset 2-1-83	Budget 9-30-83	Sunset 2-23-84	Budget 9-30-85	Budget 1-1-85	Reduction from 9-30-80	Percentage Reduction from 9-30-80
FOREIGN AIR SERVICE	DOT	242	229	219	206	187	189	168	156	147	134	<108>	45%
ESSENTIAL AIR SERVICE	"	181	182	192	172	186	179	174	155	156	145	<36>	20%
AIRLINE EMPLOYEE PROTECT.	"	—	7	5	4	11	11	20	15	15	14	14	100% Incr.
EMERGENCY PREPAREDNESS	"	2	1	2	1	1	1	1	1	1	1	< 1>	50%
SUBTOTAL		425	419	418	383	385	382	363	327	319	294	131	31%
DOH EAS DOH 401 FITNESS	Likely DOT	36	24	23	21	18	11	9	11	6	8	<28>	78%
DOH, 418 FITNESS	"	6	3	2	1	2	1	1	1	1	1	< 5>	83%
DOH-EAS DOH INSURANCE	"	6	--	5	1	1	—	1	—			< 6>	100%
DOH, AIR TAXI	"	6	1	4	1	1	1	1	1	1	1	< 5>	83%
DOH, ENVIRONMENT	"	5	4	5	4	1	1	1	1	1	1	< 4>	80%
DOH, CONSUMER PROTECTION	"	66	62	44	35	15	6	5	5	3	3	<63>	95%
SUBTOTAL		123	92	83	63	38	22	18	19	12	14	<109>	89%
TOTAL		548	511	501	446	423	404	381	346	331	308	<240>	44%
AGREEMENTS/MERGERS	DOJ	64	61	56	46	36	25	27	22	24	23	<41>	64%
POSTAL RATES	PRC	2	1	2	4	2	2	1	0	1		< 2>	100%
DOH, UNFAIR METHODS	Likely FTC/DOJ	15	7	12	7	8	4	5	1	5	5	<10>	67%
DOH, DECEPTIVE ADVERT.	"	11	9	8	8	8	8	4	1	1	2	< 9>	82%
DOH, CHARTER	"	13	7	6	6	5	3	3	3	2	2	<11>	85%
TOTAL		39	23	26	21	21	15	12	5	10	9	<30>	77%
TOTAL TRANSFERRING FUNCTIONS		653	596	585	547	496	446	421	373	366	340	<313>	48%
ROUTES AND RATES	Abolished	67	27	39	6	10	—	—	—	--	--	<67>	100%
MEMBERS OFFICES AND RELATED SUPPORT STAFF	Abolished	23	23	23	23	23	23	22	33	19	—	<23>	100%
TEMPORARY EMPLOYEES NOT INCLUDED IN SUNSET FIGURES			82		59		22		8				
TOTAL FIGURES		743	728	647	605	547	491	443	412	385	340	<403>	54%

NOTES

Sunset figures have been adjusted to reflect the number of permanent employees working in various functions as these functions were defined on 2-23-84.

Budget figures have been refined to reflect the allocation of employees to various functions defined in sunset planning documents on 2-23-84.

Mr. McKINNON. Let me for your information sort of share how we—we've got a budget that has 340 positions that transfer. We have 405 permanent people today. In a scenario, as I see this playing down, Mr. Chairman, we will lose 17 Board members and their staffs at the end of the year. That will bring you down to 388 people at the Board. We are talking about people now. We have 86 people that are eligible to retire. I am estimating that 40 of them will retire. That will bring you down to 348. We have 31 people that are going to go to other agencies, so that brings you down to 317 people. And we've been averaging six a month attrition. We don't know what's going to happen this year, so we conservatively estimate half that rate. That will bring us down to around 282 that will be available for transfer to DOT at the end of the year. I think it might even go lower, but we have a hard time being specific about these, because we don't know for sure who is going to retire. We don't know for sure what the attrition rate is going to be.

But that's the best-guess estimate I can make at the present time.

Mr. MINETA. What about your plans for transferring SES employees to DOT and other agencies?

Mr. McKINNON. Well, there's a vacant part of the law right there that says what happens to it is sort of up in the air. It depends on what is negotiated between the CAB and DOT. Of course, there is the displaced executive listing that can handle some of the SES people.

We have nine permanent SES and three noncareer SES. Our noncareer are General Counsel, Director of Community, Congressional and Consumer Affairs and the Deputy Director of the Bureau of Domestic Aviation.

Now on the career SES people, we have the Managing Director; Deputy Director of BIA; Associate Director for Negotiations and Policy Analysis in BIA; Associate Director for Economic Affairs, BIA; Director of BDA; Associate Director Economic Affairs, BDA; and over in the General Counsel's office we have Associate General Counsels for enforcement, rules and legislation, and pricing and entry. We have nine key people. It is my opinion DOT would be very wise to take this leadership group at the time of sunset and have that institutionalized knowledge of how CAB works and operates and what we have done in these different areas.

As yet, I don't think they have made up their mind what they want to do. If they don't go there, then of course under the displaced executive listing program, once we tell them they are not going, then they are eligible to find other jobs in the Government. My selfish interest as Chairman of the CAB is that I want to keep the best talent around I can until the very end. Once we identify those people as not going over to DOT, then they are going to leave mighty fast and it is going to leave some big holes for me and the whole organization.

Mr. MINETA. Mr. Chairman, have you had any discussions with OMB in which indicated they were allocating slots to DOT to handle as new responsibilities after sunset and if so, how many slots did OMB give DOT?

Mr. McKINNON. We have had some discussions. My understanding is that OMB approved 350 FTE's for 1985. The CAB in the first quarter would use no more than 97. OMB advised us that the remaining 253 FTE's for 3 quarters of the fiscal year are available to cover

the CAB employees transferring to DOT, DOJ, FTC and the Postal Service. Of the 253, approximately 230 FTE should go to DOT and this should be enough to cover the estimated 282 employees that we intend to transfer to DOT. DOT—as I understand it, has this listed in the budget as a dollar amount for DOT, but there are no FTE figures listed across from the CAB function, but it is my understanding that they are somewhere there in their budget.

Mr. MINETA. There appears to be a difference, then, between CAB's and DOT's understanding of OMB's position, I take it on this issue of positions or slots, I suppose the best way to resolve that would be to ask OMB itself and we will be doing that for the record.

Are there any functions which the Board is performing today which will not be transferred under current law? How many employees are performing these functions today and how many do you anticipate will be performing them at the time of sunset?

Mr. MCKINNON. Well, the answers to those questions are up in the air. Some of the consumer functions that you brought up, there are fitness functions, I guess you could say some of the rules that are involved, determination with regard to 411, 404(a). It's unclear whether the intent of those parts of the act was to have these functions continue to anybody. Of course there are the Board members and their staffs that will no longer be necessary.

Dick, can you think of others?

Mr. DYSON. Yes. there are a few discontinued, we understand, activities that have been contracted out perhaps and won't transfer. Mailroom, computer people, things like this. We haven't gotten precise information yet on these, but there will be come activities, mostly support, that we understand will not transfer.

Mr. MINETA. Thank you.

Mr. Hammerschmidt?

Mr. HAMMERSCHMIDT. Thank you, Mr. Chairman. Mr. Chairman, let me discuss with you some of the discussions on insulation of the decisionmaking process.

Mr. MCKINNON. Yes, sir?

Mr. HAMMERSCHMIDT. As we both know, DOT has proposed that in making carrier selections for international routes as well as in other areas such as employee protection and unfair and deceptive practices, the Secretary or the Assistant Secretary for Policy and International Affairs would have remand authority only over decisions reached by the senior career official in the Assistant Secretary's office.

While this does provide for some measure of insulation, do you think the senior career official might find it very difficult not to be responsive to the Secretary's concern if a particular carrier selection case was remanded?

Mr. MCKINNON. Of course, I have never been in the Government in an area where I had to account to a totem pole chain of command type thing. When I came to the CAB it was the idea that we were independent, we were somewhat accountable to the Congress but we were independent to make the decisions and I am not quite sure how it would come into play if I had to account to somebody for every single decision I've made.

We try to use good judgment with what we do at CAB but I would perceive it certainly has the potential and it would certainly be very important what individual was selected to have that responsibility.

Mr. HAMMERSCHMIDT. As you know, DOT apparently does not feel that EAS carrier selection decisions should be insulated since it has proposed to have the Secretary or Assistant Secretary make the selection decisions.

Do you agree there is any less of a need for insulation in this area?

Mr. MCKINNON. There certainly is need there because I can share with you, if you want to, I'll be happy to share a few examples without names of how pressures do come in on EAS.

With the Congress being what it is, there is a great desire to please a particular Congressman perhaps, rather than the Congress generally in making some of the EAS decision. It is very important, I think, to keep the budget down and realize this is an essential air service program not a desired air service program. As a result, with Congress pressure being what it is, there could be potential for influence of individual Congressmen who might desire better air service to their committee to be subsidized; so in a nutshell, that possibility that you bring up does exist.

Mr. HAMMERSCHMIDT. Most observers believe that in areas such as international route awards, it is important that any decision should be based on a complete on-the-record public proceeding where the rights of all interested parties can be adequately protected.

Where the disagreement arises is whether you go beyond these procedures and either remove the Secretary from the decisionmaking process entirely or put restrictions on the Secretary's involvement.

The following questions relate to this latter issue and I would appreciate it if you could give us your views on them.

Today, the DOT Secretary makes many important decisions which affect the rights of private parties. This includes procurement decisions and discretionary grant awards to name just two.

Since these decisions are arguably as important as carrier selection cases, is it really necessary that we take extraordinary steps to assure that the Secretary is removed or insulated from exercising final decisionmaking authority?

Mr. MCKINNON. That is a very tough question, Mr. Hammerschmidt. I think you need to analyze the decisions that are going to be involved. What is there not involving money? They are involving parties. One party is going to benefit from a decision and one is going to be hurt by the decision. In procurement, you are, by and large, dealing with the lowest bidder. You are dealing with specifications. If you want a part or a desk or a microphone, you give out certain specifications. Whoever can do that for the lowest cost—it is pretty cut and dried.

When you are dealing with carrier selection, you are dealing with a lot of issues that are somewhat subtle—flexibility, performance—there is a lot of subtleties that enter into it. It is not a black and white situation so there needs to be an internal toughness to be able to make the decision and the standards that are involved with that decision.

So if the decision is made and it is bucked up to the top—I didn't get into it in the testimony today—how many times could it be remanded back down, whether it is just once or three or four or five times.

Mr. HAMMERSCHMIDT. It can be done, as I understand it, indefinitely.

Mr. MCKINNON. Well, I think that has some type of influence. It is hard to say whether that is insulation. You either have an effect or you don't have an effect.

Mr. HAMMERSCHMIDT. Some have advocated that the President should appoint a tenured individual or individuals to make decisions in carrier selection cases, perhaps in other areas as well. This theory holds that such an individual or individuals, who would be appointed for a fixed term, would be more apt to make independent decisions based strictly on the merits, than would the DOT Secretary.

Do you agree that that might be the case?

Mr. MCKINNON. If you recall, last year I submitted legislation that was one of those ideas that would have a tenured panel. I think that is the best decision. But now I am in a position now where something has been advocated, the receiving end wants to do it, that's the way it is going to be, and I am going to do the best I know how to make it work.

Mr. HAMMERSCHMIDT. If we are going through all this in the name of insulating these decisions from political considerations I wonder why we are sunsetting the CAB at all?

Mr. MCKINNON. I arrived a little late on the scene for that decision. I think Congressman Levitas, I guess you and all your colleagues decided that was the wise way to go and that is part of the price of deregulation.

I came here to close down the CAB, I thought in 1 year's period of time incidently.

Mr. HAMMERSCHMIDT. Thank you very much.

Mr. MCKINNON. Thank you, sir.

Mr. MINETA. Mr. Levitas?

Mr. LEVITAS. Thank you very much, Mr. Chairman.

Mr. McKinnon, it is good to see you here today. I want to start off by saying that in the time you have served as Chairman, looking back, although on one or two points we had some disagreement, certainly early on, I think you have done an outstanding job, particularly in the management of an agency which was destined for sunset and in answer to Mr. Hammerschmidt's question, why do we want to sunset CAB at all I guess the answer is it seemed like a good idea at the time. [Laughter.]

Mr. MCKINNON. I appreciate your comments, Mr. Levitas but I think the management of CAB goes with the whole staff. We have got an excellent group of people. I don't think any individual can take credit for the whole thing. It has to be shared with them all.

Mr. LEVITAS. Let me ask you just one or two introductory questions that you have addressed bits and pieces of, but from a broader point of view, what is the major—what are the major problems that you are now facing as Chairman of the CAB in terms of this transition period?

As we get closer and closer to the sunset date, what are the general nature of the problems that are causing you the most difficulty?

Mr. MCKINNON. I'll try to divide that question into two answers, one about operational aspects of running the administrative day-to-day operation of the CAB and the other, the issues that are involved.

From a day-to-day standpoint, keeping morale up is a problem. Keeping the paperwork flow and having the industry serviced in a

manner that it deserves to be by our Government, to feel sure that everybody is getting a proper hearing and that things are proceeding and we don't get things boxed down, shifting people around to make the best use of the limited assets that we have—that is a problem.

The other side are things that we have discussed today in the testimony, things like what are we going to do about fitness? Should we stop taking applications for it starting July 1 or should we continue on?

What about consumer issues? I am sure Mr. Valentine is going to get into smoking, if I guessed right from this morning's testimony. What do we do about some of these issues? Do we just stop doing everything that we are doing or do we continue on doing what we are doing?

Another critical aspect in that is, as you know we are only funded until August 1. Now if we don't get any money on August 1, the CAB does not sunset, it is just in suspension and what happens at that point in time for the next 2 months? We shut down. We furlough everybody and the most damaging thing I see is international and EAS—international we will not keep on top of the fares. Our carriers will be damaged internationally and on EAS, we will not be paying out subsidy payments to the small EAS carriers. If you heard stories that make your hair stand on end over what has happened so far, you ain't heard nothin' yet because there will be many, many carriers that go out of business because they won't get their checks from the Government because they are operating on a shoestring. In those 2 months, they don't have the capital to carry themselves, so those are some of the problems we have faced.

Mr. LEVITAS. Thank you for that. It is informative to me and I think it is important to make this record in the event there's some things we can do in the Congress to assist this process.

You know, I think you and I are in accord on the fact that it would have been preferable for you not to be here today, because we should have sunset CAB as of the first of this year rather than next year, but I recognize the difficulties you are operating under.

Let me turn to page 13 of your testimony.

Mr. MCKINNON. Yes, sir.

Mr. LEVITAS. Next to the last paragraph you say, when you consider whether to make permanent the temporary 5-year CAB route authority to carriers, it is the Board's considered opinion that such action would be unwise. We found keeping such authority temporary keeps the carriers sensitive to consumer needs for fear of nonrenewal.

I have got two questions on that. One is, I would like you to explain or given me some clarification or examples of what you mean by, we have found that such authority—keeping such authority temporary keeps the carriers sensitive, because they are concerned about nonrenewal. Has it been communicated to you in that fashion or just what do you base that on?

And the second question is, Would not a permanent certificate with the right of revocation for the same reasons result in the same end without the repetitive paperwork that has to be pursued every 5 years?

Mr. MCKINNON. Let's talk about your second question first, revocation. I don't believe, Congressman Levitas, that there is that much paperwork involved but when you give somebody something and you

decide to take it back, it is a lot harder to take back something you permanently give to somebody than something you have sort of loaned to somebody in essence. It is easier to call your loan due than it is to demand back something you have given away and I think you would agree with me on that.

To get back to examples, I think the best thing I can share with you is that you get a sensitivity in dealing with the airline people and it is more of a gut feeling and a sensitivity than citing examples of abuses, where you are going to jerk their permit. It is just one of the things where they are sensitive all the time because they know that that power does exist.

I don't think the CAB has been arbitrary in handling this at all and I am not quite sure how it will be set up over at DOT. Nobody has been capricious about it, but just the fact that it is there has been a factor, I feel, that has made the airlines very sensitive to how they handle the routes and everything involved in it.

Mr. LEVITAS. Let me conclude with a couple of questions on the international authority process.

Do you believe that this—whatever we do in this regard, do you believe that it ought to be done statutorily or do you believe as does DOT that it should be left to rulemaking?

Mr. MCKINNON. You know, Congressman Levitas, I thought you brought up a very interesting point this morning because I don't think anybody ever addressed that point until you brought it up. I don't run DOT so I am a little reluctant to tell the Secretary how she ought to run it. I think that is her prerogative to do it as she sees best, but I think you raised an interesting point and certainly people are going to think about it in weeks ahead.

Mr. LEVITAS. You proposed legislation, as I recall?

Mr. MCKINNON. Yes, I did. I proposed the Civil Aeronautics Administration—sort of a modal agency within DOT that would have three tenured people making the decision and doing other jobs as well.

Mr. LEVITAS. It just seems to me that since this is such an obviously sensitive area and one in which potential abuses could occur down the line, I am comfortable with Mrs. Dole and her operation, but down the line that whatever procedures we provide ought to be a matter of policy and not a matter of the whim of whoever happens to be in that position and that is why I was very interested in your observation because I think this probably needs to be legislated.

Your proposal, of course, is one of two or three that I have looked at that seemed to me to provide a greater degree of insulation and a greater amount of freedom from interference for political reasons down the line.

I will conclude on this, Mr. Chairman. I am very pleased to hear your discussion of the need for independence in this process and by that I think we are referring to independence from political pressures within an administration.

Because I made reference earlier to one or two of our earlier disagreements and one of them happened to be on that very issue, just after you came on board and we were talking about the IATA show cause order, if you recall, at the time, my recollection is that you were

concerned that Congress was getting involved in this matter and that you wanted to wait until you found out what the administration's policy was before you made any decision on it.

I took some exception to that, if you recall, and I think that your experience, now having served as Chairman, is very strong testimony to the need to establish independence from those types of political pressures and your thinking on this particular subject I think is extremely valuable because of your own experience and what you have seen during the last few years.

Mr. McKinnon. Let me share another little incident that happened just a while ago. There is a foreign country that—well, it is public knowledge, Venezuela, where we had PanAm pull out and we had a right to send a cargo carrier down there from Florida. There were two carriers at least that were eligible at that particular point in time and about three more have now expressed a desire to go down there. A Member of Congress had a carrier that he thought was best for it. We told him no and that we have a process we have to go through. Being a good Congressman, he's looking out for his constituents and so on, so he even introduced a bill to try to have one carrier selected. After a while he understood what the realities were and has been very amicable about it.

Now we are going through a selection process where each carrier gets a fair hearing, so nobody gets specialized kind of treatment. I think he respects that and you do and most Members of Congress do and that is a very sensitive area and our insulation is needed there.

Mr. Levitas. I recall, in fact as I recall, I was one of those who offered the amendment. I may have offered the amendment to restrict the President's discretion in the award to narrow it down to those specific areas he now has.

I am much more comfortable with a system that can to the extent possible make these decisions on objective criteria rather than political influence, but when you get a chance, go back and read your letter to me of November 10, 1981.

Mr. McKinnon. I'm sure it would be interesting to look at.

Mr. Levitas. It is interesting because you were giving me the reason behind the Board's and the administration's opposition to the passage of my amendment, which the Board's and administration's was one and the same and then you advised me that the administration and the Board will reach a final decision on the IATA decision before the Board's order takes effect.

It seems to me that there was, at least in those early days, too much of a focus that what the Board and the administration did should somehow coincide and I think it is very important that that's why we can look to expertise and advice and consultation from any source but the Board or the decisions of this sort, which DOT will be making, ought to be insulated from that type of inside, in-house political pressure.

Mr. McKinnon. If I could just follow up on that. If you recall, that show cause order dealt with and eventually resulted in ECAC agreement because we held the threat of antitrust—withdrawing it from the antitrust immunity—over the European carriers by taking it away from our carriers. There are lots of ins and outs to the thing but I think it was helpful on the long run.

Mr. LEVITAS. I'm glad it worked out the way it did. I have no further questions. Thank you, Mr. McKinnon.

Mr. MCKINNON. Thank you, sir.

Mr. MINETA. Mr. Packard?

Mr. PACKARD. Thank you, Mr. Chairman.

Mr. McKinnon, in preparing for the transfer of the many employees to DOT. I'm sure that the Board has identified those employees who can perform the same types of services and jobs that they do in the transfer. Much of that would be perhaps routine. There will be some employees, however, who are very specific in their duties as it is related to the CAB organization. They may not have the same duty specificity in the transfer or they may have a variety of duties that cross several disciplines.

Do you see any problem with certain employees not fitting in with the transfer and therefore may not be considered in the transfer?

Mr. MCKINNON. Mr. Packard, the way it works, we are required under the rules OPM and under the laws you all have passed, when we shut down CAB we take the positions where work is being done today at CAB and picks up being done the next day over at DOT. Those positions transfer. We don't even have to think about it. It is as mechanical as turning on a light switch.

Mr. PACKARD. Is it true, though, with all of the employees?

Mr. MCKINNON. What I'm trying to say, those are positions that do that. We have not as yet identified the employees and told them, you are the employee in this position that goes. There has been a lot of assumption on that, I might say, but from the technical standpoint, we haven't done it. Whoever is left there at the end in these transferring positions will go to DOT and it is not one of those things to be negotiated—it's been a little hard for DOT to accept in a way that it is not a negotiating thing.

It took me a while to accept it and understand it and I think they have come to accept it now as they have testified this morning.

Mr. PACKARD. Do you believe that the number of employees who will be transferred will be adequate to take care of the need and the workload as it is transferred to DOT or do you feel that there will be a tendency to increase or decrease after sunset?

Mr. MCKINNON. I think that we are going to deliver them the people that are necessary to continue to do the jobs that are needed to be done in aviation in this country.

The question I have is do they feel the same and I don't think they are really going to know, quite candidly, Congressman Packard, until they get those people and all the functions and understand all the complexities and details of the CAB's involvement. There is a lot of overview things that are easy to talk about but there is a lot of little day-to-day routine things that nobody even knows about that are going on.

Mr. PACKARD. Do you plan for additional RIF's between now and sunset?

Mr. MCKINNON. No, we do not plan for a RIF whatsoever at CAB.

Mr. PACKARD. In Mr. Flynn's testimony, which will come later this afternoon, he has proposed that carrier selection cases for international routes be decided by a panel of three individuals chosen by the

Secretary. This will tend to further insulate the Secretary from those decisions.

Do you think that is a good idea?

Mr. McKinnon. That is sort of a hybrid of what I proposed on the Civil Aeronautics Administration, where we shifted it over to DOT.

As I read him, the problem I see, if I understand it correctly, is that there is a panel selected somewhere out there and they may be a lawyer, a doctor and a candlestick maker kind of thing. They would come in maybe once a month, make a decision, then go back. I think it is important that people who are making these decisions are involved somehow in the aviation process on a continuing basis so they have that information available to them day in, day out, on how things function and how they operate.

There is a lot of things that need to be decided besides just the route cases. There are day-to-day decisions. We have a Board meeting about every other week now but day to day there might be a dozen or more items on which the Board must make a decision and vote on and we do that by notation, where we all vote independently in our offices.

But things happen every single day. Sometimes they happen within an hour, like some exemptions maybe on cabotage, where somebody that was injured in Alaska and has to be flown down to the lower 48. Sometimes these decisions have to be around—cabotage, of course, is illegal.

Mr. Packard. One of the major issues still unresolved and you referred to it as in just passing earlier was the fact that the appropriations will discontinue as of what— August 1?

Mr. McKinnon. Yes, sir.

Mr. Packard. Yet sunset will not take place until after that. There is an interim period where funding is still in limbo.

Do you feel that the Appropriations Committee on both sides of the aisle is sensitive to your needs there and what is the relationship there? If you don't get funding, then what?

Mr. McKinnon. Well, I feel we just testified I believe it was to the House Appropriations Subcommittee. I believe they are sensitive and they understand the problems. The Senate comes up on the 15th of March. That is going to be an interesting session because the chairman of the Senate Appropriations Subcommittee thinks he made a mistake the way he voted on deregulation, so he is not too keen about it.

The problem is though, I think the Congress, when urgent needs come along, is sensitive and acts responsibly and in this case acting responsibly is giving the money to keep the CAB alive those extra 2 months so that we can keep all this essential air service and all the other things the aviation industry of this country depends upon.

I can't believe in my wildest imagination that Congress would do anything but act responsibly in that area. How they are going to do it, I don't know but I think they are going to do it.

Mr. Packard. This may be a sensitive question but the concept of sunsetting CAB I'm sure was part of the deregulation process on the part of consolidation of Government. I think you are aware, of course, that the administration has been deliberately moving in that direction and conceptually I feel that you perhaps accept that concept.

Do you feel that after transfer is made there will not be any change in the service or in the nature of addressing the critical issues involving aviation generally, do you think that will change to any great degree as it takes place?

In essence, do you feel the same kind and level of service that CAB has been able to give will continue? Do you feel philosophically that it is the appropriate move to go in terms of sunset?

Mr. McKINNON. Let me answer a couple of things that way.

No. 1, I believe in deregulation. I believe it is working. The functions that CAB is basically doing now are going to continue on over at DOT. When I came to town my charge was to close down the Civil Aeronautics Board and so I accepted the charge and that is what I am going to do.

I think DOT needs to be held accountable for their actions and I hate to be put in a position of saying, is it going to work as well over there as it did in the past?

It is a tough situation.

Mr. PACKARD. What I was asking really was, are you committed to sunsetting?

Mr. McKINNON. Yes, sir, I think we are pretty far down the road. You'd have to do something pretty radical to change that direction. If what you are saying is keep the CAB alive and slim it down or do something of that nature, I would comment here as far as deregulation goes and the fear of going to reregulation or something, if you are going to go back to reregulation, there is no question in my mind the Congress can just all of a sudden put something back together real quick. It does not matter how far you dispersed all this stuff, you can retrieve it real fast if you want to do it. I don't see any need to but this is the course you are on, so I think you probably ought to stay the course.

Mr. PACKARD. Thank you.

Mr. MINETA. Mr. Valentine?

Mr. VALENTINE. Mr. McKinnon, I do want to ask you some questions.

I want to say something, though, at the beginning. I want to tell you that I have been very much impressed by your presentation here, by the way you handled yourself, and by your very obvious intelligence and sincerity; and I want to say to you also that I know that there are some of us in the Congress—you know I am a new guy here—that are called the Tobacco Boys, who can whoop and holler and raise you-know-what every time a sensitive nerve is touched and I want to kind of identify myself with the Tobacco Boys; and at the same time kind of separate myself if I can, and to do that I want to tell you to understand how some of us from the Southeastern part of the United States feel about our much-maligned product.

One must have some feeling about what it means to the economy especially of eastern North Carolina, very much like some other substances that are not designed to be therapeutic or medicinal and maybe not always sanctioned by the best of us, such as some of these things that if used in moderation are OK and if used excessively are bad, like California wine and Kentucky bourbon whiskey and I just want to see to it if I can that we are treated fairly in this great Republic here.

I am not going to ask you anything. I am a lawyer and I am not going to ask you anything and, if I do, I know that you won't answer it. That will be improper because you have before you a matter of great moment, but I want to just talk to ask you a question about philosophy.

What is it that gives, in your opinion, the Civil Aeronautics Board, the CAB, and as I said earlier, in the twilight of its life to all of a sudden decide that it maybe should declare something illegal if it is done on an airplane that is perfectly legal if you do it in the passenger waiting room?

From whence does this authority come?

Mr. McKINNON. It comes from the court of appeals. Some time ago the Civil Aeronautics Board made a decision on smoking. That decision was taken through the court process, went to the court of appeals and the court of appeals at that time under section 404(a) of the act said that we had authority to regulate smoking aboard aircraft.

Mr. VALENTINE. Yes, sir, but that said you had the authority to regulate it. That didn't say that you had the authority to say to a citizen of the United States that wanted to smoke that you can't smoke.

I agree with them and I do say this at the beginning—I represent a lot of consumers. I agree with your ability to regulate it. I don't think anybody ought to be exposed to a situation where you sit down in an airplane and have somebody blow smoke in your face, and I think that to have a smoking section and a nonsmoking section—I used to smoke and I quit smoking. I always go in the nonsmoking section. I worried about Uncle Frank, if he had a nicotine fit in addition to the other problems that Mr. Oberstar talked about, but do you understand, sir, do you interpret that decision to say that you can absolutely bar it, what is an otherwise legal act?

We are not talking about marijuana. We are talking about the bright leaf eastern North Carolina tobacco. It is legal.

Mr. McKINNON. Yes, sir, I am sure southern Carolina and a few others too, even Virginia, but the court told us to take another look at the issue and they sent it back and told us we had the authority over it.

They told us because of the way we had acted before, to take another look at the issue. Now everybody has had an opportunity to talk. We held 2 days of oral arguments at the Board. We held the third day this week to allow Members of Congress who are on work recess to come back and testify. I don't have any problem with you telling me whatever you want because it is on the record. It is out here open in the public right now, so I am up here to hear you instead of you down there for me to hear, but here are the facts—up to this point we haven't banned smoking on all aircraft for all the time of the flight. That is up for consideration for 2-hour flights. Somebody mentioned 200 miles. It is for a 2-hour or 1-hour flight and there is a variety of other aspects to it but that is what is being considered. It is perfectly legal for us to do it and it is a responsibility.

Mr. VALENTINE. Do you know why the regulation of smoking has been with us for awhile, why is it that this is being considered now, at a time when you are going out of business, to create all this uproar? Why now?

McKINNON. That's just the way the timing from the court decision took place until the time it has evolved in hearings and what has come out. I might share with you, you are bringing up a very interesting point. You are bringing up the point of insulation. If you were chairman of my Appropriations Subcommittee and I had to account to you for this and a variety of other issues, would I be more sensitive to what you are saying than I might be to what anybody else says?

As Chairman of the CAB I am the head of a regulatory agency and I can banter back and forth with you about it, take a viewpoint and in a very polite, very nice, very diplomatic way, say, Congressman Valentine, that is the way I feel, you can like it or lump it. [Laughter.]

Now, I could say that. I didn't say that. [Laughter.]

And that fear of retribution from you, I don't know how that is going to play in the executive branch.

Mr. VALENTINE. I understand what you are saying. I know that is a problem. That is why I said what I did in the beginning, because I don't want to—I don't like these guys that sit up here sometimes and try to shove people around and that is the reason I said what I did at the beginning about if I say anything that you regard as improper because you are acting as a judge and I am kind of talking about the lawsuit, that is the reason I wanted to cast it in the area of a philosophy and that sort of thing.

Let me just ask you this, Mr. McKinnon, has there been any suggestion on whose motion did this come before your agency?

Mr. McKINNON. It came from the court, Congressman, it came from the court. We made some decisions. People weren't happy with them. They took them to the court to appeal it.

One of the first things they wanted to do is determine if the CAB had the power to act on this to begin with?

The court of appeals decided we did have the power under section 404(a) but the court remanded it back to us and said we want you to take another look at the facts. We don't think you've looked at it quite the proper way.

So through the process of notices and that type of thing it's come, now here it is we're out of business in 10 months but that is how—where we are today.

Mr. VALENTINE. But it started before it went into the court on whose volition or did someone come and file a petition and say we don't think we ought to be able to smoke on an airplane or was it your—was it the CAB that started it?

Mr. DYSON. We've had various petitions along the way on this. The most recent one was from ASH, Action for Smoking and Health. We've had earlier ones from some other organizations. We have had petitions, quite a series of them.

Mr. VALENTINE. I suppose it all comes back to the responsibility to provide for adequate transportation. What would it take for one to have—what would it have taken? It is too late for you to consider at the same time another product as to whether or not alcoholic beverage shouldn't be barred, you know, on the theory that what could be really worse for airline transportation? People get drunk, they disturb things, they might fall around in the aisle and they might do a lot of things.

What worries me about it is that these two substances are just treated here. You tell a man he can drink all the booze he wants but he can't have a cigarette for 2 hours.

Mr. PACKARD. Will the gentleman yield, please?

Mr. VALENTINE. Yes.

Mr. PACKARD. If you would like some recommendation that we also bar alcoholic beverages, I'll be happy to support that.

Mr. VALENTINE. Yes.

Mr. MCKINNON. What I would like to share with you on that is that we are part of the Government. The people pay taxes to have us here and they deserve an opportunity to be heard before us as we carry out the laws.

Section 404(a) talks about safe and adequate service. We have been petitioned by people like ASH and other groups, GASP and some of the others that think that smoking is offensive on the airplane. They don't want to breathe the smoke. They have a right to come before their government and petition us under the laws that we have authority over to say we don't like this. We want you to do something about it. That has what has happened on smoking. There have been people that come to us and say, we don't like to breathe that smoke on the airplane. It is offensive to us.

We are required, I think, as government to give them a fair hearing and that is what we are doing.

Now the tobacco interests say, we don't like that. The airlines say, that is an inconvenience for us, we don't want you to do anything. But at least everyone is getting their fair day in court and as a lawyer I think you can appreciate everyone should have an opportunity to be heard and what better place do they have than go before the Government and get a fair hearing and that's what the smoking thing is all about.

Those who don't like smoking can try to win and persuade those in government to vote their way, then that is what government is about. If they don't, then tobacco interests get what they want and that is what government is all about and that is what this whole case of smoking is about.

Mr. VALENTINE. Do you think that any ruling that you make, Mr. McKinnon, would survive the agency? Wouldn't it, if you do decide it under section—what is it? Section 404(a), wouldn't your ruling die with your agency?

Mr. MCKINNON. Yes, sir, it does die at the end of this year if you don't do anything on 404(a) but also I should point out it affects—if you don't renew that section, another area that we are involved in is nondiscrimination on the basis of a handicap.

Airlines could—we can keep them from discriminating against handicapped people they carry. Some don't want to carry you, if you are in a wheelchair, something like that. We say those people have rights too. They have the opportunity to be carried. That will go out the door as well.

It also affects the rules because it's 404 and 411, our charters. Our charters, you know, they had the Redskins charter here a couple of years going to the Superbowl. There were some people left stranded. We had authority over that to be sure other people didn't get stranded.

There may be only one or two bad apples but there would have been a lot more if CAB charter rules weren't in effect.

Baggage liability, where you have got some protection on your bags; oversales, if you are bumped; notice in terms of contract carriage; these are all 404 and 411 combination. If you let those rules lapse, if you think you're going to get rid of the tobacco and smoking problem on the airplane because you don't put in 404, you are going to affect a lot of other areas as well innocently. So it puts you in a tough situation. I understand, but I think we want to share all the facts with you on it.

Mr. VALENTINE. Right. Thank you very much.

Mr. MINETA. Mr. Chairman, you seek a decision on fitness determination as soon as possible. I can't speak for the entire Congress, but I can tell you that I will be supporting legislation to take care of several specific loose ends, as I mentioned in my opening statement.

One of them is that the Board's existing fitness authority would be statutorily preserved and would be assigned to DOT, so there is at least no mistake about what my intent is. I sense from the discussion here today that many of my colleagues are of the same opinion, so that may give you at least some sense where the Congress may be going on this issue.

Mr. Hammerschmidt.

Mr. HAMMERSCHMIDT. Thank you, Mr. Chairman. I just have one other matter I wanted to touch on that was in your statement. I take it from your remarks at the bottom of page 13 that as the renewal proceeding draws near on a temporary, international route certificate, the incumbent airliner has to be more sensitive to consumer interests than at other times.

I see you said that it keeps the carrier sensitive to consumer needs for fear of nonrenewal. What are some of those items they might be sensitive to, Mr. Chairman?

Mr. MCKINNON. Sensitive to scheduling and sensitive to all the consumer problems that an airline is involved with. They don't want to have a bad reputation coming back to the CAB on any of the dealings or handlings they have knowing full well that CAB is going to be making a judgment on them in a relatively short period of time for everything they are involved with including their relations with foreign countries, every aspect of it.

I just would hesitate to pick out one specific area.

Mr. HAMMERSCHMIDT. Thank you very much, thank you, Mr. Chairman.

Mr. MINETA. Mr. Chairman, thank you very much. I appreciate, all of us appreciate, the time you have spent on the job there at the CAB, as well as being here today to inform us about the issues that we are going to have to look at very carefully, as we try to sort out this whole issue of sunset, and where those functions will go.

I know that during your tenure, it has been a very difficult time, seeing responsibilities that automatically terminate because of the act of 1978, and, at the same time, knowing your concerns about trying to keep good people on board, as well as looking out for the welfare of those good employees that you have there at the CAB.

I know you have expressed that over and over to me on a number of occasions about your concerns about the people at CAB so again, I just want to thank you very much for your testimony here in helping us unravel these issues.

Mr. McKINNON. I appreciate being here.

Mr. MINETA. I would like you, frankly to extend our thanks to the employees at CAB.

Mr. McKINNON. I'd be happy to do that in our newsletter. You know, it's interesting, at least it has given some opportunities in sort of a battlefield promotion way to give a lot of people an opportunity at responsibility they might not normally get because the top of the rank is going down. The next rank moves up to fill their place.

As you know, the people at the table here have changed considerably over the 3 years I've been here, so it has given them opportunities, too. We appreciate being here.

Mr. MINETA. Thank you very much, Mr. Chairman, Mr. Coleman and Mr. Dyson.

Next, I would like to call on Mr. John B. Flynn, formerly of the Department of Transportation, a person who was a senior aviation official from 1968 to 1982 with the Department of Transportation.

Mr. Flynn, please come forward.

The full text of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

February 29, 1984

STATEMENT OF

JOHN B. FLYNN, AIR TRANSPORT ADVISOR

BEFORE THE

AVIATION SUBCOMMITTEE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

U.S. HOUSE OF REPRESENTATIVES

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to present my views on the Department of Transportation's (DOT) plan to provide insulation from political influences in international carrier selection cases.

My background shows that I have had extensive economic and legal experiences in international route cases and bilateral negotiations at both an independent regulatory agency and in the executive branch. During my 17 years at the CAB, I served as an economic witness in major route hearings, and actively participated as a member of the U.S. delegation in numerous bilateral negotiations. In my 14 years at DOT, I continued to participate actively in bilateral decision-making and international route cases. I also served as executive director of two Administration International Aviation policy reviews and headed a special aviation office set up by the Secretary to direct the Administration's Federal Action Plan to improve the competitive posture of U.S. international airlines. Before leaving DOT in 1982 to become an aviation consultant, I served as DOT's Director, Office of Air Transportation, and as the Senior Aviation Advisor to the Assistant Secretary for Policy and International Affairs.

COMMENTS ON THE DOT PLAN

DOT's plan to provide insulation from political influence in international carrier selection cases would be to have an Administrative Law Judge (ALJ) make a recommended decision which would thereafter be reviewed and decided by the senior career official in the Office of the Assistant Secretary for Policy and International Affairs. The Assistant Secretary or the Secretary would have discretionary authority to review each decision limited to approving it or remanding it for reconsideration. The President's veto powers would continue to be limited to foreign affairs and national defense reasons.

This proposal raises several concerns as to whether it best assures fairness and objectivity in carrier selection cases while limiting such decisions from political pressures. It is important that the process not only be fair, but to be seen as fair. I have the following concerns:

- the senior career official deals with the Assistant Secretary on a frequent basis on a variety of aviation issues. Since the Assistant Secretary has authority to review carrier selection cases, it provides an appearance or perception of possible political pressures.
- it opens up the possibility of increasing the White House's involvement with its political appointees to influence the decision outside of its 801 powers.
- it involves the Assistant Secretary or the Secretary in an area in which they now have no real interest. It has been DOT's policy since 1970 to keep out of carrier selection issues. Its interest is in route awards which are obtained in bilateral negotiations, and not the identity of the carrier to serve the route.

- the senior career official may be involved in a conflict of interest. His office is intimately involved in the negotiating process with several interested carriers which are seeking new route awards, and now he would be selecting the carrier.
- the senior career official is subject to more political pressures than a career civil servant, or someone who has an appointment for a definite period of time.

ALTERNATIVE PROCEDURES TO CONSIDER

I offer the following proposal as a better plan for insuring fairness and objectivity while providing adequate insulation from political pressures. It also does not change the degree of insulation we have today.

An ALJ's recommended decision could be reviewed and decided by an independent three (3) member panel of qualified individuals appointed by the Secretary. They could be appointed for a set number of years, or, if the work load is limited, they could be appointed from a roster of qualified persons selected by the Secretary. The Panel's decision would not be subject to review by the Assistant Secretary or the Secretary.

A three-member decision would have less potential bias than DOT's plan, and be comparable to the judicial and regulatory agency decision-making machinery. The political pressures would be no greater than they are today at the C.A.B. The Secretary would still be able to offer advice to the President for exercising his Section 801 powers.

In the interest of further speeding up the decision-making process, I suggest a second option. It would bypass an ALJ hearing and be fully consistent with the Administrative Procedures Act. There is no need for a broad time-consuming hearing on this single, uncomplicated issue before an ALJ. There is no legal issue; only a determination as to which carrier to

select. Position briefs and replies could be filed by interested parties with the Panel prior to oral argument. The C.A.B. now hears exemption cases involving carrier selection issues, e.g. Braniff's South American routes and Dallas-London authority. The C.A.B. does not require ALJ decisions for foreign air carrier permit proceedings, or for its essential air service determinations, including carrier selections issues. In fact, since 1977 the ALJ staff has been reduced from 26 to four. This second option, therefore, would not only assure fair decisions in carrier selection cases, it would also reduce administrative burdens and costs for the taxpayers and the air carrier industry.

Mr. Chairman, this concludes my statement.

Mr. MINETA. Please proceed.

TESTIMONY OF JOHN B. FLYNN, AIR TRANSPORTATION ADVISER, FORMER SENIOR AVIATION ADVISER TO THE ASSISTANT SECRETARY FOR POLICY AND INTERNATIONAL AFFAIRS, OFFICE OF AIR TRANSPORTATION, DEPARTMENT OF TRANSPORTATION

Mr. MINETA. Mr. Flynn, we on the subcommittee have been the beneficiaries of services of someone with whom you are familiar, a person who you trained well and we do appreciate very much the work of your training.

I know that David Traynham has been with you at the Department of Transportation, and we thank you for all your training of David.

Mr. FLYNN. Thank you very much.

Mr. Chairman and members of the subcommittee, thank you for the opportunity to allow me to present my views on the Department of Transportation's plan to provide insulation from political influences in international carrier selection cases.

My written statement contains information on my credentials to speak on this issue, but briefly, I was intimately involved in decisionmaking in both international route cases and bilateral negotiations during my 17 years with the CAB and 14 years with DOT.

Before leaving DOT in 1982, I served as its Director in the Office of Air Transportation and as a senior aviation adviser to the Assistant Secretary for Policy and International Affairs.

DOT's plan to provide insulation from political influence has been described and I won't repeat it further, but the proposal raises several concerns as to whether it best assures fairness and objectivity in carrier selection cases while limiting such decisions from political pressure. It is important that the process not only be fair but to be seen as fair and I have the following concerns.

The senior career official deals with the Assistant Secretary on a frequent basis on a variety of aviation and other transportation issues. Indeed, at the present time, they are even physically located in the same office and since the Assistant Secretary has authority to review carrier selection cases, it provides an appearance or perception of possible political pressures.

It also opens up the possibility of increasing the White House's involvement with its political appointees to influence the decision outside of its 801 powers. The White House could be in touch with the Department prior to any section 801 review, so this actually broadens the White House role, which was limited in the Airline Deregulation Act due to the White House involvement in the Braniff/Dallas-London award and the DOT plan also involves the Assistant Secretary or the Secretary in an area in which they have historically had no real interest.

It has been DOT policy since 1970 to keep out of carrier selection issues. In fact, in 1970, the Department proposed to have a two-phased type hearing in the east coast/Europe investigation in which the route selection would go to the President for review but the carrier selected for the route would not go to the President and that has essentially been the Department's rule historically, that the President as well as the Department should not be involved in selecting carriers.

The Department's interest is in route awards, which are obtained in bilateral negotiations and not the identity of the carrier to serve the route.

And also the remand authority is reminiscent of a 1970 South Pacific decision where the President returned a decision to the CAB by changing the route to be awarded so that it actually ended up excluding the carrier that was selected by the Board.

The senior career official may also be involved in a conflict of interest. His office is intimately involved in the negotiating process with several interesting carriers which are seeking new route awards and now he would also be selecting the carrier.

A recent case in point involved the route negotiations with China, where DOT's Deputy Secretary headed the U.S. delegation. Under the DOT plan, he would also be selecting the carrier and the senior career official is also subject to more political pressure than a career civil servant or someone who has an appointment for a definite period of time.

Under Senior Executive Service, a position can more easily be abolished or transferred or downgraded.

Well, I offer the following proposal as a better plan for insuring fairness and objectivity while providing adequate insulation from political pressures. It also does not change the degree of insulation we have today. An ALJ's recommended decision can be reviewed and decided by an independent three-member panel of qualified individuals appointed by the Secretary. They could be appointed for a certain number of years or if the workload is limited, they could be appointed from a roster of qualified persons selected by the Secretary.

Actually, I am directing my recommendation here just to carrier selection, but this panel could be used to decide other cases as well and the panel's decision would not be subject to review by the Assistant Secretary or the Secretary.

There is precedent in DOT for this procedure. A couple of years ago Secretary Lewis appointed a three-member task force headed by former Federal Aviation Administrator McLucas as the chairman to hear and decide the controversial three-member crew complement issue, which turned out to be a decision which was made without any disagreement among all the parties concerned on a controversial subject.

A three-person decision would have less potential bias than DOT's one-person decision plan. The one-person decision plan also places a tremendous burden on that particular individual, which is another problem. And a three-member decision would be comparable to judicial and regulatory agency decisionmaking machinery. The political pressures would, under this plan, be no greater than they are today at the CAB and the Secretary would still be able to offer advice to the President for exercising his section 801 powers.

In the interest of further speeding up the decisionmaking process, I also suggest a second option. It would be one which would bypass an ALJ hearing and would be fully consistent with the Administrative Procedures Act. There is no need for a broad time-consuming hearing on this single, uncomplicated issue before an ALJ. There is no legal issue; only a determination as to which carrier to select.

Position briefs and replies could be filed by interested parties with the panel prior to oral argument. The CAB now hears exemption cases involving carrier selection issues prior to an ALJ hearing.

For example, Braniff's South American routes and Dallas-London authority were determined by exemption hearing. The CAB does not now require ALJ decision for foreign air carrier permit proceedings or for its essential air service determinations including carrier selection issues.

In fact, since 1977, the ALJ staff has been reduced from 26 to 4. There are presently four ALJ's which hear all the cases we have talked about this morning from witnesses from DOT and the CAB.

The second option, therefore, would not only assure fair decisions in carrier selection cases but it would also reduce administrative burdens and costs for the taxpayers and the air carrier industry.

Several speakers at DOT's sunset seminar last year, who are experienced in quasi-judicial procedures also supported speedier hearing procedures.

Mr. Chairman, this concludes my statement.

Mr. MINETA. Thank you very much, Mr. Flynn.

Since you have been a high level senior civil servant, I would like to get the benefit of your experience with regard to the issue of insulation. It strikes me that without status, tenure, and responsibilities which are independent of a senior civil servant's political superiors, insulation from those superiors is very thin.

If the senior civil servant is dependent on his or her superiors for assignments, staff, as well as career enhancement through advancement, isn't that senior civil servant going to be naturally disposed to please his or her superiors?

In any organization, particularly political or governmental ones, there are always rumors and scuttlebutt about what the bosses want. Those aren't secrets. Senior civil servants will be aware of them.

So, from your experience as a high level civil servant, does the DOT plan for carrier selection address the issue of insulation in the real world environment of senior civil servants?

Mr. FLYNN. I don't think it really does. I think the main issue, of course, is to get the best people to make the decision but you have to avoid an appearance or a perception of possible influence and the fact that you have a person in the same office as an Assistant Secretary with the Secretary being above that particular level, it opens up the possibility of pressures and I think if there is a better way to avoid that, you should try to avoid it.

That is why I raised the alternative statement.

Mr. MINETA. Is one of your concerns on insulation that the administration through the Assistant Secretary or Secretary, since they are as you say in the same office, is one of your concerns that they could influence the senior career official's carrier selection decisions prior to those decisions being made?

DOT's plan would have the political officials only being able to remand, but I take it your concern is over what happens between the career official and the Assistant Secretary prior to the decision being made?

Is my understanding of your testimony accurate?

Mr. FLYNN. That's right. It opens up that possibility just as it does to the Secretary and the Assistant Secretary who has influence coming from the White House before the White House would be reviewing under 801 review.

If the industry went to the White House with a concern that they were unhappy about a decision, they in turn could have tried to influence from the back door in, so that's another—it opens up that possibility, that perception that that could occur and it seems to me when the Airline Deregulation Act was passed in 1978 because of that kind of concern at the White House level, the President's powers were limited in carrier selection cases because of what appeared to be an abuse.

Mr. MINETA. You say that the senior career official may become involved in a conflict of interest between his or her negotiating role, his or her carrier selection role. Can you elaborate on this and describe how this situation would be different from the present situation at the CAB, where you have Board members participating in the negotiations as well as participating in the carrier selection?

Mr. FLYNN. Well, I gave the example of China route negotiation, where the Deputy Assistant Secretary headed the negotiation and under the DOT plan, he would be the same party making the decision, so as far as DOT is concerned, you have the Office involved in negotiating routes and you have certain carriers which are trying to influence the gaining of those routes on the way.

As far as the CAB presently, there is a certain conflict of interest that the CAB has by being a member of the U.S. delegation. I guess what has happened over the years with the CAB is that most of the routes have been obtained through bilateral negotiations prior to any hearings for what routes we would be negotiating for and that has been mainly an executive function, to go out and get the routes.

Then it is a matter now of just determining the carrier who will serve those particular routes.

Mr. MINETA. You suggest the elimination of hearings before an ALJ because you believe this would result in less regulatory burden. But without the hearing process before an ALJ, can an adequate record be developed?

In the ALJ hearing process, isn't there opportunity for cross-examination of witnesses by the various parties in the case?

With your proposal, would there be opportunity for this type of exchange and is it your opinion that these hearings are not that particularly useful?

Mr. FLYNN. In my view, the cross-examination that is taking place at hearings has tended to not only involve a great deal of time to come to the issue but there is a great deal of excess in those cases and experience tells you that when it comes time, when you really get the route is when you come down to argue before the CAB and not the administrative law judge and when arguments are raised, you will find how few exhibits are referred to as being pertinent exhibits to really buttress your case.

The administrative law judge proceeding is loaded down with endless numbers of volumes which in the end aren't even looked at and the cross-examination is not looked at by the Civil Aeronautics Board. They are not a party to the oral argument—to the cross-examination.

There is enough cross-examination that can take place before the CAB today or before a three-member panel. You would have the parties presenting their cases with briefs. You would have reply briefs,

which would essentially be conducting a cross-examination at that stage and then if you had oral argument, you would be raising both your own case and giving arguments against selecting another carrier on the other hand, so you would have an adequate record and in carrier selection cases you are dealing simply with which carrier is going to serve the route.

You are not looking at evidence on the route to be served. The route has already been negotiated for. So it would cut down on the time-consuming aspect.

And the Board has found over the last number of years that they have been able to do that since they have reduced the number of law judges from 26 to 4 and we have carrier selection cases today on essential air service areas which are not heard by administrative law judges.

It comes to the Board—they try to decide the carrier selection by three members of the staff at the CAB right now but if there is an argument thereafter it would go to the CAB, but the ALJ doesn't come into it at all.

Mr. MINETA. Thank you. Mr. Hammerschmidt.

Mr. HAMMERSCHMIDT. Thank you, Mr. Chairman.

Mr. Flynn, we appreciate your being here and giving us your testimony today. Let me pursue the idea that the chairman was on just a little bit with you.

In your testimony, you suggest in lieu of hearings, international carrier selection cases could be decided utilizing a simplified procedure which would involve having cases decided on the written record with the availability of oral argument.

Do you think that both of these suggestions, hearings and simplified procedures, could be accommodated provided that there were criteria that would enable DOT to decide under what circumstances the simplified procedures should apply?

Is there some tradeoff position in there?

Mr. FLYNN. I think the simplified procedures can actually be used in all the cases that are now decided by the CAB.

Mr. HAMMERSCHMIDT. In all cases.

Mr. FLYNN. I think it can.

Mr. HAMMERSCHMIDT. Thank you. Under the DOT plan, the Assistant Secretary for Policy and International Affairs will not only have discretion to review and remand all formal hearing decisions involving international carrier selection, but also employee protection, international unfair or deceptive practices and unfair and discriminatory competitive practices petitions.

Do you propose that the procedures as outlined in your testimony would apply to all of these determinations as well?

Mr. FLYNN. Well, my testimony was addressed to carrier selection. I actually believe there are other cases that would have to be decided by DOT. There are other route cases that would be decided. For example, to London, to identify a new route to London, and that this panel, all three members could be used to also hear those particular cases, yes.

Mr. HAMMERSCHMIDT. Well, if a three-member independent panel was established, I'd be interested in knowing what your definition of qualified individuals would be for that panel?

Mr. FLYNN. My definition would be that they should have backgrounds in aviation, economics or law and preferably on economics because the CAB is an economic expert. Their decisions are based on economics of air transportation and I believe that is one of the qualifications they should have. And then you have the legal backgrounds.

In carrier selection I find that there is no legal issue. It is a matter of selecting a carrier to serve a route and there mainly the carrier selection criteria that the Board has had over the years is all over the lot. If anybody was asked to describe a criteria for how you select a carrier, you couldn't describe it.

It essentially has to be based on getting the best carrier in that can do the best job at the lowest rate and it's mainly an economic issue.

The qualified panel members should have expertise in this area of economics and law, aviation economics and law and I think Secretary Lewis, that is what he was looking for when he created his panel. He was looking for experts in the field of airline safety to deal with the three-member crew issue and he appointed three members who were extremely qualified people to deal with the subject and as a result you had no argument from the loser at the other end. They accepted the decision as being one that was a valid one.

So again you are moving people in who would be less subject to criticism and you also bring in three members rather than having the one, which to me is a tremendous burden on one man to make a decision.

Mr. HAMMERSCHMIDT. I would appreciate getting your comments on one more concern that you expressed over the DOT plan to provide insulation, and that was that it opens up the possibility of increasing White House involvement with its political appointees to influence carrier selection cases.

To what extent does the availability of judicial review as well as criminal law minimize the possibility that ex parte political considerations will unfairly affect the outcome of a particular case?

Mr. FLYNN. There has always been judicial review. It would be the same today as before, but we found historically that it has been necessary to limit the White House's influence because even though we have had judicial review in the past, there does appear to be undue influence from the White House level, so I think in the case that caused the Congress to limit the President' powers in 1978, there seems to be a reluctance on the part of unsuccessful carriers to go to judicial review.

Pan American was the one that lost out on the Dallas-London route. Even though it appeared to be undue influence coming from the White House to change the name of the carrier to serve the route, the carriers generally have chosen historically not to take that path——

Mr. HAMMERSCHMIDT. Have the courts ever reversed a CAB international carrier selection order?

Mr. FLYNN. I can't remember anybody ever having gone and even judicial review that you have on cases, they generally don't change the decision. They tell the Board to get more evidence. In other words, you didn't support your decision. So all they have to do is hear a case and get more evidence and made the same decision.

Mr. HAMMERSCHMIDT. Thank you, Mr. Flynn for your patience and your testimony. Thank you, Mr. Chairman.

Mr. FLYNN. Thank you very much.

Mr. MINETA. Mr. Flynn, thank you very much. We really appreciate your coming in and testifying, especially being able to draw on your 31 years of experience there at CAB and DOT.

We appreciate very much your taking time and interest to be here as a witness.

Mr. FLYNN. Thank you very much.

Mr. MINETA. If there are no further questions, the subcommittee wil stand in recess until 10 a.m. tomorrow in room 2253.

The subcommittee stands in recess.

[Whereupon, at 5:30 p.m. the hearing was recessed, to resume at 10 a.m. on March 1, 1984, in room 2253.]

REVIEW OF AIRLINE DEREGULATION AND SUNSET OF THE CIVIL AERONAUTICS BOARD

(Organization and Procedures To Be Followed by the Department of Transportation in Administering Its New Responsibilities After Sunset of the Civil Aeronautics Board)

THURSDAY, MARCH 1, 1984

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON AVIATION,
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:21 a.m., in room 2253, Rayburn House Office Building, Hon. Norman Y. Mineta (chairman of the subcommittee) presiding.

Mr. MINETA. The subcommittee will please come to order.

We are pleased to have as our witness today, Cornish Hitchcock, Legal Director of the Aviation Consumer Action Project, known by its acronym ACAP.

Mr. Hitchcock, the full text of your prepared statement will appear in the record at this point.

[Statement referred to follows:]

DOT ADMINISTRATION OF AIRLINE REGULATORY RESPONSIBILITIES AFTER CAB SUNSET

Testimony of Cornish F. Hitchcock
Legal Director, Aviation Consumer Action Project

Before the Subcommittee on Aviation
Committee on Public Works and Transportation
U.S. House of Representatives

Washington, D.C.
1 March 1984

Mr. Chairman, members of the Subcommittee:

On behalf of the Aviation Consumer Action Project (ACAP), I appreciate the invitation to be with you today to discuss how the Department of Transportation will administer airline regulatory responsibilities following the sunset of the Civil Aeronautics Board on 31 December 1984.

ACAP is the only non-profit consumer organization working full-time on aviation matters. Since its founding in 1971, ACAP has participated in numerous regulatory proceedings before the CAB, the FAA and other government bodies. We have testified before Congress, published various studies and reports and offered advice to tens of thousands of passengers. ACAP is totally supported by contributions from the public.

Because the Subcommittee is holding an additional set of hearings on legislative proposals relating to airline deregulation and CAB sunset, we will not comment on any of those issues today and will limit our testimony to how the Department of Transportation proposes to exercise the functions transferred to it under the Airline Deregulation Act of 1978.

At the public hearing held by the Department on this issue in March of 1983, ACAP testified in favor of establishing a modal administration within the Department, the same way that DOT now regulates air safety, highway safety, maritime matters, etc. Our belief was that such an administraton, headed by a single Administrator, would have been the most efficient way of exercising the transferred CAB authority. While DOT has done a very thorough job in showing how it will split its inherited functions among existing DOT offices, we are not sure why such a break-up will work better than a modal administration. In fact, the last time that DOT acquired authority from another agency -- when it inherited the Maritime Administration several years ago -- it retained the agency as a modal administration.

In making this observation, we recognize that some of the CAB's non-regulatory functions -- such as participation in international negotiations, economic analysis and data collection -- could be integrated into existing DOT offices, possibly at a savings. With respect to the CAB's residual regulatory functions, however -- such as carrier selection on international routes, the Essential Air Service program, fitness determinations and policing unfair or deceptive practices -- we are concerned that the proposed break-up may lead to inefficiences.

Keeping regulatory responsibilities under a single modal roof seems to have worked well during DOT's history. yet the proposed reorganization not only scatters duties throughout

DOT, but it also vests considerable regulatory authority in the Office of the Assistant Secretary for Policy and International Affairs, which has traditionally been more of a policymaking rather than a regulatory position. This is something of a change from previous policy in this area, and if the Department plans to go ahead with its proposal as is, we would encourage the Department to keep an eye on how the structure is working and to consider consolidation of functions into a more streamlined organization, should it appear that there is duplication and overlap.

Let me now turn from the general organizational issues to some of the specific questions about how DOT will perform certain functions. I would like first to discuss carrier selection in limited entry international markets. The Department has chosen an approach which mirrors the current procedure followed by the Board, although a single Deputy Assistant Secretary, a career official, is effectively substituted for the present five-person Board as the decision-maker. Generally speaking, we believe that the DOT proposal would effectively continue the current CAB procedures in this area, in that applications would be assigned to an Administrative Law Judge for hearing, a recommended decision would be issued, and the matter would be subject to a higher level of review within the Deprtment before going to the President under section 801 of the Federal Aviation Act. One area which needs to be addressed in more detail is how and under what circumstances the Deputy Assistant

Secretary's decision could be reviewed by the Assistant Secretary or even the Secretary, as well as the question of what role should be played by these officials and their staffs in contested route cases.

This brings me to an issue which has caused some concern, and that is the question of insulating the decision makers from the possibility of improper influence. The suggestion has been made that DOT is somehow unable to handle carrier selection because, as an executive branch department, it is subject to more political pressure than the independent CAB. In our view, it is possible for DOT to perform the function in an even handed manner. We reject the notion that the Department is somehow less qualified to make these decisions than an independent agency. Regulatory agencies exist in many other branches of the executive branch, including DOT, and there is always the threat that the regulated industry will try and improperly tilt a decision one way or the other. While obviously we do not endorse such conduct, we do not think that entrusting power to an "independent" rather than an "executive" agency somehow cures the problem, as evidenced by past off-the-record attempts to persuade CAB members and staff to vote for one carrier over another in route cases.

So long as the federal government is passing out valuable benefits, there will always be the risk that applicants will be tempted to try and gain an improper advantage. This is best policed by adoption of rules

regarding ex parte contacts and the separation of functions, such as CAB has had in effect for a number of years. While we are pleased to see that such rules will be applied by DOT in these route cases, there is a need to clarify the extent to which they will apply to officials within DOT above the Deputy Assistant Secretary. For example, can an airline make an off-the-record pitch to the General Counsel or the Deputy Secretary, who may pass along these thoughts to the Assistant Secretary or the Secretary, both of whom would have authority to remand a decision by the Deputy Assistant Secretary? The point we are making is that the rules should be applied to all DOT personnel who may play a role in deciding a case or offering advice to decision-makers, not just to the personnel involved in litigating the particular route cases up to the Deputy.

Let me now turn to several other issues briefly. One very favorable feature of the DOT proposal is the prominence that it has given to consumer matters through the establishment of an Office of Consumer Affairs. We hope that this symbolizes a strong commitment by the Department to providing assistance to individual consumers by helping them learn what their rights are and how to enforce them. We also hope that there will be comparable vigorous enforcement of consumer protection regulations should that function be transferred to DOT by subsequent legislation.

Another issue of concern is that of fitness. The Department suggests in its report that considerations of

financial and managerial fitness be simply handed over to FAA as part of its determination of safety fitness. We are troubled because these considerations might be given unduly short shrift by FAA, whose expertise is in safety regulation and not necessarily in the managerial and financial aspects which the CAB examines. Our concern is that these issues might be given too low a profile if they are simply folded into the analysis presently performed by FAA personnel. While we are not advocating that fitness be regulated in a heavy handed manner, as the Board did in the days when entry regulation was rather restrictive, we believe that financial and managerial background remain appropriate factors to be considered in issuing a certificate.

I would add in conclusion that we commented on a number of these issues in more detail as part of our written comments to the Department of Transortation in early 1983. With your permission I would like to submit for the record a copy of our comments, which deal with some of these issues in more detail.

Thank you for this opportunity to be with you today, and I will be happy to answer your questions.

acap

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BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C. 20590

RECOMMENDATIONS FOR DOT PROCEDURES TO	)	
	)	Docket 76
PERFORM INTERNATIONAL AVIATION FUNCTIONS	)	

COMMENTS OF AVIATION CONSUMER ACTION PROJECT

Communications with respect to
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31 January 1983

31 January 1983

RECOMMENDATIONS FOR DOT PROCEDURES TO)
PERFORM INTERNATIONAL AVIATION FUNCTIONS) Docket 76

COMMENTS OF AVIATION CONSUMER ACTION PROJECT

The Aviation Consumer Action Project (ACAP), a non-profit consumer organization, submits these comments in response to the Department of Transportation's request for recommendations on how it should exercise regulatory authority over international aviation when that responsibility is transferred from the Civil Aeronautics Board in 1985. 47 Fed. Reg. 54405 (2 Dec. 1982). In particular, DOT has sought comment on international route awards in limited-entry markets; enforcement of international unfair competitive practices complaints; international tariff filing; and international inter-carrier agreements.

These comments will be rather general, since the Department's notice was broadly written and since DOT and the public are at an early stage of considering these issues. Thus, they should be regarded as preliminary and subject to refinements as the course of the discussion progresses. Additionally, some of the ideas expressed in these comments are submitted for the purpose of stimulating discussion and debate on all facets of the issues. Finally, because there may be legislation to alter the assignment of functions after CAB sunset, these comments will discuss alternatives beyond those in the present law.

1. International route awards. While most bilateral aviation agreements provide for unlimited designations of U.S. airlines, there are some markets where the number of carriers is restricted by agreement. Illustrative is the 1977 "Bermuda II" agreement between the United States and the United Kingdom which, even with the modifications negotiated in 1980, generally allows only one U.S. and one U.K. airline at all but the largest U.S. gateways. Similarly, our 1980 agreement with the Peoples' Republic of China allows for only two U.S. airlines.

Under current CAB regulations regarding limited-entry markets, a route proceeding is opened before a CAB administrative law judge who, after considering formal evidentiary submissions by the CAB's Bureau of International Aviation, applicants, other carriers, government agencies and other interested parties, issues an initial decision recommending a particular carrier for the route and a back-up carrier. The award is then considered by the full Board, which may affirm or modify the ALJ's selections. The Board's decision then goes to the President, who has 60 days to disapprove the decision, though he can do so "solely on the basis of foreign relations or national defense considerations, but not upon the basis of economic or carrier selection considerations." Federal Aviation Act § 801(a). If CAB action is disapproved, the President shall state publicly his reasons to the extent permitted by national security. Id.

The vagueness in the present law leaves DOT essential-

ly free to adopt this procedure or any other once the Board's authority is transferred to DOT. We see no compelling reason for DOT to depart from the CAB's current practice in this area, with some appropriate changes, nor do we see any reason why DOT is incapable of handling the job. Carrier selection of any sort is philosophically objectionable under the open-entry regime in effect in domestic and a number of foreign markets. Instead of allowing the marketplace to decide which services will be provided consumers by which airlines, limited-entry markets force a government agency to bestow monopoly or duopoly rights upon a chosen airline. It is that carrier (and its foreign counterpart) upon which the flying public relies for service.

Given the reality of limited-entry markets, however, some form of carrier selection is necessary, and there is no really "good" system to use, only a series of "not so good" alternatives. Every selection procedure has a certain random element, which makes it impossible to predict which airline will win and which airlines will lose, regardless of whether one employs quasi-judicial hearings, pulls a name out of a hat or auctions off the rights to the highest bidder. Confronted with a reality in which randomness and elements of chance are always present, the policy goal is to pick a system which best serves the public and does so in a manner which is procedurally fair to all applicants.

Two alternatives to traditional carrier selection have been proposed -- lotteries and auctions -- but it is not

clear that either would be preferable to the present system. As the recent lotteries involving airport landing slots demonstrated, such procedures may encourage an airline to seek valuable landing rights not because they could be used for service that makes sense as part of the airline's overall route structure, but because the landing rights are scarce, and the cost of taking part in a lottery is low. It strikes us that this type of system is a bit too random, particularly if the public is going to be limited to the winning U.S. airline and its foreign counterpart for the forseeable future. One might try to deal with this problem by imposing minimum fitness standards or qualifying criteria in order for "eligible" carriers to qualify for a lottery, but that is simply carrier selection in a somewhat different guise, and depending on how the criteria are written, the eligibility criteria can be very liberal or very restrictive.

The use of auctions for carrier selection is intriguing. There may be some promise to a system which looks at fare proposals filed by applicants and awards route rights according to the lowest coach fare that is proposed. There is several questions about this approach which need to be explored, e.g., how well would it work in markets with limited fare flexibility? The approach of simply auctioning off rights to the highest bidder has some practical objections to it, as the winning carrier's ability to capitalize on the high bid may depend on free market condi-

tions not always present in limited-entry markets. For example, the other nation may seek to limit the U.S. carrier's frequencies or restrict its efforts to use larger aircraft, making economical operations difficult. And given the distaste of many nations for fares set below the IATA norms, a winning carrier may find it hard to use pricing as a competitive weapon. Moreover, the highest bidder may seek the route rights not because it wants to compete aggressively, but because it wishes to shelter its routes which are adjacent to the route up for bids. Also, the highest bidder may not be the carrier which could provide the best service to the public, but simply the wealthiest or the one with the best cash or credit position at the time of the auction. Finally, it strikes us as somewhat offensive for the United States Government simply to be auctioning off valuable public rights without some kind of inquiry into the public's stake in the matter. Unlike domestic markets and open-entry foreign markets, the public could be stuck with the winning U.S. airline and its foreign counterpart for a long time.

Viewed in this context, it appears that current CAB carrier selection procedures may be a bit like Churchill's observation about democracy being a terrible system, but better than others that might be tried. Traditional carrier selection procedures give the decision-maker a chance to assess all the relevant factors, such as levels of service proposed, fare offerings, available connections and the like. It may not be a perfect system, and it may often be

difficult to choose between a number of qualified airlines vying for a particular route. But it seems preferable to systems which are likely to be more random and less likely to factor in the public's interest in the decision.

The concern has been expressed that current CAB procedures would be sullied if moved out of the independent, quasi-judicial Board and into an executive branch Department where political pressure and lobbying -- and not the merits -- would determine the winners. As a way to avoid "politicizing" the carrier selection process, the proposal has been made to maintain the CAB as an independent agency after 1 January 1985, but limit its duties to the international functions which are the subject of this proceeding, as well as possibly the Essential Air Service program.

In our view, there are methods of responding to these concerns even if this authority is transferred to DOT on schedule. Moreover, maintaining a slimmed-down CAB as a separate entity in the federal government may cause more problems than it solves.

The following procedures are submitted as one proposal to assure procedural fairness in as "non-political" a manner as possible in the situation where a federal agency is dispensing lucrative route rights.

The CAB functions being transferred to DOT under the Deregulation Act (principally international and Essential Air Service) could be placed under an Assistant Secretary or a new modal administrator for civil aviation. Of the two

options, a modal administration with a single administrator seems the better model. That is the way DOT is presently organized, with the Secretary's duties delegated to these administrations under the DOT Act of 1966, with separate administrations for air safety (FAA), auto safety (NHTSA), highways (FHwA), mass transit (UMTA), and the Coast Guard. These administrators are mostly Level III Executive Service officials, the same rank as the Chairmen of the CAB, ICC, FMC and NTSB, one step above Assistant Secretaries and one step below the Deputy Secretary.

Under this arrangement, there would be a two-tiered layer of carrier selection in lieu of the present three-tiered system (ALJ, full CAB review, Presidential review), under which an administrative law judge in DOT would conduct an evidentiary hearing similar to what is now conducted at the CAB. All private parties, as well as government agencies, would be able to take part. To the extent that foreign policy or national defense concerns can be publicly stated, they should also be put on the record.

The ALJ would issue an initial decision, which could be reviewed by the new Administrator. This review by the Administrator would then issue an order either affirming or altering the carrier selection and stating reasons. This order would be subject to judicial review under the Administrative Procedure Act. Since the Administrator would be a high-level member of the Executive Branch, there would seem to be no reason to require submitting that decision to the

President for review on foreign policy or national security grounds. The Administrator may properly consider those factors, and, if they influence his or her decision, they should be spelled out to the extent possible, as now required by section 801.

It is doubtful that there will be any defense or foreign policy problems in limited-entry markets of such magnitude as to require continued section 801 review. In these markets, it is clear that the United States has a right to name at least one airline, and the only issue is which one. One may also question the degree to which foreign policy or defense concerns, which are legitimately a concern of the President and the Secretary, are ever so intrusive in route cases these days as to warrant non-designation of a particular airline. Even if there might be some valid foreign policy reason for not letting a newly designated airline start service to a given country -- as was suggested when the United States wanted to designate an additional U.S. airline to serve Japan in the Transpacific case of the late 1960's -- that is no reason for aborting the administrative proceeding. An appropriate solution might be that suggested by the American Bar Association in testimony before the Senate Aviation Subcommittee in August 1978, namely, issuing the certificate, but delaying implementation (i.e., formal submission of the certificate to the foreign government) until such issues are resolved.

Procedural fairness could be built into the Adminis-

trator's review process by adopting rules regarding ex parte contacts and separation of functions rules of the sort now governing CAB cases. An instructive document regarding the maintainence of integrity in the carrier selection process was President Ford's 1976 executive order (no. 11920) regarding contacts with the White House staff and agency comments on carrier selection procedures. The problem with this Executive Order, though, is that it did not go far enough. It forbade White House staff from discussing pending matters with private parties and required these officials to refer any written communciation from an outside party to State, DOT or another appropriate agency. Additionally, agencies were directed to communicate directly with the CAB about their concerns during CAB proceedings and to establish public dockets for written communications they received in connection with developing recommendations.

Unfortunately, this Executive Order sought to regulate only ex parte contacts with the President or agency officials involving private parties. It did not in any way regulate efforts to influence a decision by non-parties which support a particular airline, including elected officials (such as Congressmen and governors). Such lobbying reportedly took place during President Carter's consideration of the Transatlantic route case in 1977, when the governor of Georgia spoke to the President regarding Delta's pending designation to serve Atlanta-London, and a group of Texas Congressmen gave the President a document prepared by

Braniff at a time when it was competing for Dallas-London authority and at a time when the President was looking for Southern votes on pending energy legislation.

To make the DOT selection process as fair as possible and to avoid such lobbying in the future, there should be an absolute ban, once a route case has been initiated, on off-the-record oral or written communications with the Administrator or the staff which will be advising him or her on the decision. This prohibition should apply to all private parties, as well as to government agencies and officials at all levels. */ Any oral communications, no matter what the source, could be summarized in writing and filed in a public docket, along with all written communications, and sanctions would be available for serious violations. In addition, separation of functions rules should be applied, so that, for example, an Assistant Administrator whose staff is preparing the bureau's case before the ALJ must opt either (1) to advise the Administrator, thus staying out of preparation of the staff's case, or (2) take part in preparing the staff's case and be bound by rules limiting contacts with the Administrator on this matter.

The problem of controlling ex parte contacts is a chronic one, regardless of who is making the decision. The

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*/ Any foreign policy or defense concerns which State or Defense wishes to communicate to the ALJ or Administrator should be publicly stated in the record to the extent possible. If any such concerns are so sensitive that they cannot be put on the record, the Departments should transmit classified comments for in camera review, and the record should state that such communcations were made.

vice of such communications lies in the lack of notice to other parties and the lack of opportunity to rebut them. That is why agencies have traditionally insisted that the content of oral and written communicatons be publicized. There could, in addition, be more severe penalties for egregious violations, e.g., civil penalties or disqualification from the route proceeding in question.

The notion that carrier selection cannot be performed by DOT without unduly politicizing the process seems to be bottomed, at least in part, on the premise that the current situation is free from efforts at political influence. That is not entirely so. Applicants routinely solicit the support of elected officials and civic parties to appear before the Board, either in person or through written testimony. In addition, there have been efforts to influence CAB Members directly, most recently in the "Wild Card" Minneapolis-London route case three years ago. Finally, even if the Board's quasi-judicial proceedings are free from taint, things can be very political in the final phase of the process under section 801, as demonstrated by the Transpacific case under Presidents Johnson and Nixon; the American-Western and Eastern-Caribair merger cases of the early 1970s, which involved foreign route rights; and the Transatlantic case under President Carter.

This is not to say that the selection process should be political, simply that when lucrative route rights are at stake, political pressures are inescapable, regardless of

the selection method employed. Thus, the proper question is how to make the system fair to all applicants. The best way of doing this is by insulating the Administrator and his or her staff from ex parte contacts with interested parties, requiring any such communications to be made public, and imposing sanctions for breaches of those rules.

Suppose the Secretary wants to get involved in the process. Is there not the risk that the Secretary might want to favor one airline over another and to overrule the Administrator in a given case? Is there not the risk that applicants and others would try and influence the Secretary?

Ordinarily, DOT Secretaries have not gotten involved in day-to-day decisions of these modal agencies, nor have they regularly tried to overturn decisions on anything except the most controversial cases. Most route cases are rather routine, and thus one may question, on practical grounds, how likely it is that a Secretary going to get involved in a messy dispute over who flies between, say, Chicago and Paris, particularly if his or her direct involvement will lead to charges of improper influence and favoritism. Conceivably, there might be a case where a Secretary wants to overrule an Administrator on foreign policy or defense grounds, which the Secretary believes have not been adequately considered, and such an option should be available, subject to the same limitations as section 801(a), i.e., foreign policy and defense reasons, not economics or carrier selection.

As a more general means of regulating efforts by parties to get the Secretary involved in carrier selection, the standards regulating ex parte contacts with the Administrator and his or her employees could be extended to communications with the Secretary and DOT officials from the time a route proceeding is opened until the case is over. Finally, if the Secretary does choose to overrule the Administrator, the fact should be made clear on the record, and any order entered by the Secretary should be subject to judicial review under the same criteria as a decision of the Administrator.

Several other objections might be raised to giving the Secretary or an Administrator plenary authority in this area and in favor of keeping an independent agency.

a. Carrier selection would be done by one person instead of a collegial Board. This argument does not strike us as compelling. Many agencies with responsibilities far more significant than deciding, say, who gets to fly between Denver and Mexico City are headed by one administrator (EPA, FDA), including the DOT modal agencies. We question whether the decision-making process in route cases is such that collegial discussion between five persons is going to yield a better result for the public than if a single person reviewed all the evidence and opposing arguments and made his or her best judgment. If anything, the fact that a single Administrator would have that much power might be an incentive to future administrations to choose only the most qualified individuals for the slot. Thus, the number of

decision-makers does not seem to be a critical factor.

b. Carrier selection should be carried out in an "independent" agency. It is indisputable that the selection process should be independent and free from taint, but it is less clear why achieving this goal requires an "independent" agency, as opposed to an "executive" one in order to yield a better result for the public.

It is important to look behind the labels of "independent" and "executive" and ask what practical differences there really are in a period of constant congressional oversight, budget cutbacks, annual appropriations bills, OMB directives and the like. In recent years, CAB's international aviation policy has been the subject of several controversial hearings before Congress, as well as riders on the last two Transportation Appropriations bills: the 1981 Levitas amendment, which was signed into law, was designed to block implementation of the CAB's order affecting IATA traffic conferences across the North Atlantic, and the 1982 Johnston amendment, which cleared the Senate, specifically related to the New Orleans-London route case. These are the sorts of pressures that afflict executive and independent agencies alike, and we are not sure that having routes awarded by an entity called "independent" will assure better service than if the agency is called "executive."

Moreover, there are good reasons for moving carrier selection within DOT. One is simply organizational: there are bound to be more efficiencies if route selection were

done as part of a coordinated transportation department, rather than as an independent agency. Additionally, international aviation should be seen as part of an overall transportation policy, not as a separate entity unto itself.

A second reason is that carrier selection is likely to receive more attention from other elements of the government if it is part of DOT than if CAB were retained as a smaller independent agency with carrier selection as its sole or even principal function. At its present reduced size of 500 or so staff, CAB is on its way to becoming one of the smallest agencies in the government; if its functions were pared back to international aviation duties and its independent status maintained, it might have significant new problems. As a small, highly specialized agency, there might be difficulty in staving off budget cuts without a high-level champion, such as a cabinet officer. Also, there may be difficulty attracting qualified personnel at such a small agency, a situation which might make it an inviting target to White House officials looking to fill patronage slots.

If, however, there really is a desire on the part of Congress or others interested in this issue to maintain carrier selection in an independent, multi-headed agency, there is no reason to continue the CAB's existence, but simply to fold the carrier selection process into another agency which is already skilled in international regulatory matters -- the International Trade Commission. While such a transfer would require new legislation, there are policy

arguments for this approach. After all, international aviation is a form of trade, and ITC is experienced with trade matters in a number of industries. If it were to absorb certain CAB personnel with international aviation expertise, it could quickly come up to speed on this industry as well. Additionally, ITC commissioners have as much independence as CAB members, and their decision-making process can be just as quasi-judicial and include all the procedural safeguards now afforded parties in CAB route cases.

Yet another option would be the establishment of a multi-modal agency which would handle not only the remainder of economic regulation of the airlines, but also remaining FMC and ICC functions with respect to maritime, rail and motor carrier economic regulation. This type of approach might be increasingly attractive in coming years if, as seems likely, there is legislation which follows up on the Motor Carrier Act of 1980 and the Staggers Rail Act of 1980 and "sunsets" economic regulation in these industries.

At this time, however, simply melding together the CAB, ICC and FMC and then sunsetting various functions may pose practical and administrative problems. There is also the policy concern if the agency were to be set up with five commissioners, including a "rail" seat, an "airline" seat, a "maritime" seat, and so forth. There are conceptual and philosophical differences in regulating the different modes at the present stage of their development, as well as differences in domestic and international transportation which

would have to be considered. Nonetheless, the concept of a multi-modal agency may, in the long run, be the most effective means of administering whatever economic regulation remains in the transportation industries after the most recent and and any imminent deregulatory statutes.

For all these reasons, then, there appears to be no reason why DOT cannot replica current CAB carrier selection procedures for international route caes, giving a new civil aviation administator or some other DOT official final say in the matter and seeking to shelter the process from political pressure through strict ex parte and separation of function rules.

2. Unfair Competitive Practices Complaints.

Complaints of unfair practices could be handled by DOT through existing CAB procedures, with slight modifications. Complaints could be filed with either an Assistant Secretary or a new modal Administator for aviation matters, with a preference for the latter, for reasons already stated. The matter could be assigned to an administrative law judge for a hearing, and the initial decision would be subject to review by the Administrator or some other high-level DOT official under appellate procedural safeguards of the sort discussed earlier.

Vigorous enforcement of unfair competition complaints by U.S. airlines is and should continue to be an important part of U.S. international aviation policy. In recent years, most complaints have tended to be settled not through

the litigation process, but in the course of bilateral negotiations in which the pendency of the complaint is a bargaining chip. There should be no administrative or political difficulties if this function were to be transferred to DOT in a format similar to that used at present. Again, if there is an interest in keeping this function in an independent agency, we suggest ITC, which is in the full-time business of considering unfair trade practice complaints involving a variety of industries and products.

3. International Tariff Filing.

The existing functions regarding the filing of international tariffs could be transferred to DOT using present criteria and procedures, either in the office of an assistant secretary or in a new modal administration. The Secretary, an Assistant Secretary, or an Administrator could be given power to suspend or reject a rate. After such a transfer, one may question the continued need for section 801(b) of the Federal Aviation Act, which gives the President the right to overrule an order suspending or rejecting a tariff on foreign policy or defense grounds. Since the suspension decision would thus be made by a high-level executive branch official, there is less need for direct Presidential review. Here again, there could be a procedure whereby the Secretary could overrule the Assistant Secretary or Administrator if, in the Secretary's opinion, foreign policy or national defense concerns were not fully considered.

Once again, there is the alternative model of entrusting responsibility to the ITC, which has functions very similar to the CAB in other trade areas. ITC can take action with respect to unfair practices of foreign competitors, such as below-cost pricing, and its decisions cannot take effect if disapproved by the President under procedures similar to Section 801.

4. International Agreements.

Under current law, the Justice Department will inherit responsibility for reviewing inter-carrier agreements affecting foreign transportation under section 412(a) of the Act and giving antitrust immunity, if warranted, under section 414. Various proposals have been made to give this authority to DOT, which may be appropriate, especially if other functions are transferred, either to an assistant secretary or a new administrator.

The question arises over what criteria should govern (1) approval of agreements under section 412 and (2) the grant of antitrust immunity under section 414. As to the former, DOT should borrow the standard erected in the Airline Deregulation Act for domestic agreements, i.e., that the agreement cannot be approved if it "substantially reduces or eliminates competition," unless it is found that the agreement "is necessary to meet a serious transportation need or to secure important public benefits" which cannot "be secured by reasonably available alternative means having materially less anti-competitive effects." Federal

Aviation Act § 412(c)(2)(A)(i). The burden should be on the applicant to present justifications for the agreement and to discuss the competitive impact on the public.

As to the antitrust immunity standard, it is difficult to suggest a better or more workable criterion than the "public interest" test set forth in section 414. There are two suggestions in this area, both of which may require legislation. First, DOT should be able to request and obtain from the Justice Department a letter stating whether particular agreements would violate the antitrust laws, absent a grant of immunity. We note that there is a Business Review Procedure available to obtain Justice's opinion on proposed mergers and acquistions, and a similar proposal was included in the 1982 statute to facilitate the formation of export trading companies. Such statements from Justice would be helpful in making decisions on immunity, and the Department would be free to intervene on its own with repect to particular agreements, as it now does before the FMC.

The second proposal would be to "sunset" agreements after, say, five years, unless the proponents can produce arguments for renewal of an agreement for an additional period of time. Such a periodic review would ensure that antitrust immunity is extended only to the extent necessary to best serve the public.

Respectfully submitted,

Cornish F. Hitchcock
Legal Director

Mr. MINETA. Please proceed.

TESTIMONY OF CORNISH F. HITCHCOCK, LEGAL DIRECTOR, AVIATION CONSUMER ACTION PROJECT

Mr. HITCHCOCK. What I will try to do is summarize my prepared statement. And since I am the only witness today, I will try to be more scintillating, if possible. We appreciate the invitation to be here this morning to discuss the organizational issues of how the Department of Transportation will administer the CAB's post-sunset function.

Because there will be additional hearings on substantive legislative proposals to deal with specific residual functions, what I will do is save our comments on those matters for that set of hearings, in several weeks, and focus solely on the organizational issues today.

At the DOT public hearing, in March 1983, we testified in favor of establishing a modal administration within the department, the same way that DOT now regulates air safety, highway safety, maritime matters, and so forth. Our belief is that such an administration, which would be headed by a single administrator, would be the most efficient way of exercising those remaining CAB functions.

The Department has done a very thorough job in showing how it plans to split up the functions that it will inherit from the CAB. We are really not sure whether that kind of a breakup will work better, as far as efficiency in operations. There is what happened precedent for keeping functions under one roof, and that is when the Maritime Administration was transferred from Commerce to DOT in 1981, and it is organized the same way that other agencies are within the department.

Now, in making this observation, we recognize that the nonregulatory functions—international negotiations, economic analysis, and the data collection—could be integrated into existing DOT offices, at possibly some kind of savings. As for the residual regulatory functions—and I make the distinction here of regulatory versus nonregulatory, including carrier selections, essential air service, fitness determination, unfair practices—the breakup may lead to deficiencies because of the number of offices involved in each decision, over and above the current structure of the Board. Keeping regulatory responsibilities for a mode under one roof seems to have worked well.

What we are also concerned about is that the proposal transfers considerable regulatory authority to the office of the Assistant Secretary, which has traditionally been more of a policymaking office rather than a regulatory position. It is a change from policy. It is not necessarily bad to do, but from the standpoint of other administrative organizations, we think it is better to have one agency.

Let me turn now from the general organizational comments to some of the more specific questions about how DOT will carry out its functions, and I would like to focus first on carrier selection in limited entry international markets. The proposal by DOT essentially tracks current CAB policy, with the difference that a Deputy Assistant Secretary, who is a career official, will make the decision instead of the five person Board, as now happens.

34-015 O - 84 - 14

In effect, we think this sort of organization could be transferred to a modal administration that tracks that, and it might be better to do that. One area that needs to be addressed in more detail is how, and under what circumstances, any decision would be reviewed by the Assistant Secretary or the Secretary, as well as the question of what role these officials and their staffs are going to have to play in contested route cases.

DOT does plan for some limited review authority of the decision, but we're not really sure how it is going to be exercised, whether there are going to be two tiers of review potentially, by the Secretary as well as the Assistant Secretary. Those are some questions that need to be addressed.

This brings me to an issue that has caused some concern by the subcommittee and others, and rightly so, and that is the problem of insulating decisionmakers from the possibility of improper influence. The suggestion has been made that DOT is somehow unable to handle carrier selection because it is subject to more political pressure than the independent CAB. In our view it is possible for DOT to carry out these functions in an even handed manner.

Frankly, we're not sure that the label of independent versus executive really provides any kind of useful breakpoint for determining whether one agency can perform functions and another cannot. There have been, in the past, efforts to sway CAB members in contested route cases, in particular, airlines trying to lobby members off the record. It is going to be a problem, I think, anytime you have a Federal agency that passes out valuable benefits, regardless of whether it's a license for airline rights or whatever other kinds of benefits that you have.

Because it is always a problem, we think that the remedy that has been traditionally employed is separation of functions. We are pleased to see that it will be followed in the various DOT proceedings. One subject of concern is the need to clarify the extent to which these rules will apply, not just to the decisionmakers, at the Deputy Assistant Secretary level and below, but elsewhere within the Department. For instance, would it be possible, under DOT's plan, for someone to lobby the General Counsel, who then passes on his or her thoughts to the Assistant Secretary or the Secretary? How does one police that particular situation? It is what you might call the conduit problem, going around the decisionmaking chain to get one's views expressed.

The point that we are making here is that if ex parte rules and separation of function rules are going to be applied, they should be applied across the board. I think, here again, the notion of having a modal administration, where you have an agency that is going to be making the decisions, and going to be insulated, helps avoid these problems of contacts from others elsewhere in the Department.

I would like to touch on several other issues, briefly. One favorable feature of the DOT proposal is the prominence that is given to consumer matters, through the creation of a new Office of Consumer Affairs. We hope this will create a strong commitment to providing assistance to individual consumers, and helping them learn what their rights are and how they can enforce them, as well as the comparable vigorous enforcement of consumer protection rules, if that function is also transferred to DOT by subsequent legislation.

And finally, there is the question of fitness. The DOT suggests that considerations of financial and managerial fitness simply be handed over to FAA as part of its determination of safety fitness. We are troubled that these considerations might be given unduly short shrift by FAA, if the existing personnel are just told, "By the way, consider these other factors in addition to everything else you are considering." We are not urging that fitness be regulated in the same heavy handed manner that it was by the board a number of years ago. It is important to consider those issues, and Chairman McKinnon touched on that yesterday, in his testimony.

And with that, I will close and be prepared to answer any questions you may have.

Mr. MINETA. That material will be made part of the hearing.

Mr. HITCHCOCK. Thank you.

Mr. MINETA. In your testimony, you discussed the question of improper influences on decisionmaking in an executive branch department, such as DOT, and an independent regulatory agency, such as the CAB. It seems to me that your discussion focuses on one important aspect of the problem. That is the question of the off-record attempts to influence the decisionmakers.

I would certainly agree with you, that this is an important issue, but it seems to me that the question is broader. Aviation decisions can be based on nonaviation political consideration, even if there are no ex parte discussions before the decision is reached.

To give a purely hypothetical example, the Secretary of Transportation could give an international route to an airline known to be favored by a particular Member of Congress, in the hopes that the reward could be used at a later date to gain the Member's support on—let's say—the National Airport amendment, or Caribbean Basin legislation, or whatever it might be.

Similarly, an international route could be given to an airline by the Secretary because the Secretary knew that the airline had directors who were friends of someone in high political office, running for office, like the President, with large political contributors.

Would you agree that it is possible that aviation decisions could be based on these types of nonaviation considerations, even if there were no ex parte communications? Would you also agree that it would not be desirable to have aviation awards made on this basis?

Mr. HITCHCOCK. I agree with everything you said. That is an excellent point. Let me answer that by going back and making some comments on particular aspects of your question.

In the first place, there have been incidents in the past where those types of decisions were, in fact, made. I understand, at the Presidential level, the story goes that the President preferred the president of one airline over another. There was a story several years back where the President was visited by the Governor of a State who had a preference of an airline, or when the President needed certain votes on unrelated energy legislation. In this situation, the President did in fact have the power to actually change the carriers.

I think the potential for abuse is much greater there than it is in a situation where the Secretary or the Assistant Secretary can remand a case for further consideration. I think you are dealing with a type of

situation where if the Secretary does decide, in effect to overrule a decision by a modal administator, or Deputy Assistant Secretary, and send it back for further consideration, that raises those issues and plants questions. People are going to start saying: Why? Why are you getting involved in this decision? And start asking the types of questions which you are asking. I think there is a political risk.

Second, there is the possibility, I think even with the CAB in the past, that members may bring to their jobs particular views. For example, some may favor giving awards to traditional established international carriers. Others may have a bias to spread the wealth around, as it were, and to give it to new entrants. Others may say well, "We gave airline A a route last time. Now it is time for airline B." Such an approach does not necessarily deal solely with the merits of who should be serving a particular route.

And finally, if I may, I think it is important to recall that in the carrier selection area, you are dealing with a decision that really should be made in the marketplace, not by divvying up routes and trying to decide within the context of a quasi-judicial proceeding, which airline is better than another. We are dealing with impossible decisions.

For example, in the Wild Card case a couple of years ago, the case was who should fly between Minneapolis and London? It came down to Northwest and Western. This is difficult to decide between the two, under the best of circumstances. A lot of the problems that you do identify are definitely very real. I think they are present and real under the current situation.

Mr. MINETA. Recognizing you have touched on part of the next question, I would like to follow up.

Mr. HITCHCOCK. Sure.

Mr. MINETA. I would like to explore several ways in which I think the high ranking executive branch official, such as the Secretary of Transportation, or the Assistant Secretary for Policy in International Affairs is more likely to be tempted by nonaviation political considerations than a member of an independent regulatory agency.

First, it seems to me that a high official of an executive agency operates in a free-wheeling political environment much more often than does the head of a regulatory agency. Most of the regulatory agency's work is quasi-judicial and does not involve legislation. By contrast, a high ranking official of the Department of Transportation is a political appointee with responsibilities for getting the Department's and the administration's legislative program enacted and getting the administration reelected.

It would seem that the mere nature of the job gives the Secretary of Transportation many more temptations than are faced by the Chairman of the Civil Aeronautics Board, to base aviation decisions on nonaviation political considerations. Would you agree?

Mr. HITCHCOCK. There is that temptation. I think the way you would handle that is not by giving the Assistant Secretary the regulatory powers in addition to policymaking powers. That is why we suggested the modal administration. You have the same types of situations there where National Highway Traffic Safety Administration or the FAA have to make a number of decisions that may be politically touchy. But they still are made at the modal administrative level.

It's the same thing here. If you had a modal administration that was isolated and that was performing quasi-judicial functions, you do tend to provide some degree of insulation. You do give visibility to what the administrator decides. And I think it is the type of situation where if the Secretary is going to step in, it raises questions. There are questions that have been raised in the past, when the Secretary attempts to overrule a particular modal administration on a particular issue. The charge is that they are bowing to political pressure or whatever.

If you limit the extent to which the Secretary can try to overrule decisions, and I think what DOT has said is that you simply remand for further consideration, that helps police it to some extent. You have that situation in court all the time. The court of appeals may send a matter back to the trial court. But the trial court may, after further consideration, still come to the same conclusion.

As long as the Secretary realizes there is the possibility of political backlash at any time he or she does remand the decision, that helps to deal with the situation.

You have the same problem now, anytime the President decides to send something back to the agency. It reflects on the White House and people start saying, "Gee, why doesn't the President want to give it to airline A? Airline B is the only other choice."

Mr. MINETA. That is the point. We have seen abuses, even under an independent regulatory system. Doesn't the temptation become greater with an executive agency involved in that?

Mr. HITCHCOCK. It is an imperfect process. As long as you have Government officials deciding questions that really should be decided in a more competitive manner, that is a risk.

There were questions raised with respect to lotteries or auctions, or something of that nature, which do definitely remove the possibility of taint. But those have their own problems.

Mr. MINETA. You get to the question on how effective the limits that would be placed on DOT, would be as far as the role of the Secretary or the Assistant Secretary. First, it would seem that the senior civil servant is not in a good position to act independently of the Secretary or Assistant Secretary in a case where these officials want a particular carrier to get a route for nonaviation reasons.

You are an old Washington hand. I'm sure you can appreciate that the preferences of high ranking officials can be made known without there being any technical violation of the ex parte rule. I have questioned how the senior career official could resist these preferences when his or her position or job function would be held entirely at the pleasure of the Assistant Secretary or Secretary.

The career official has no tenure in office in a particular job, only tenure in office on the civil service rolls. In addition, the quality of the job held by a career civil servant is entirely within the control of his or her superiors. Whether the type of work that he or she is given is interesting, whether the level of responsibilities and staff that he or she is given is adequate. These, and all other aspects of the job, can be changed on a moment's notice by the Secretary or the Assistant Secretary.

It seems to me that this gives a career official strong incentives to do what his or her superiors want in aviation cases and that could be a problem. Would you agree?

Mr. HITCHCOCK. Surely, That's why I think the better approach is to have an administrator at the same level as the Federal Highway Administrator or the Federal Aviation Administrator, who would perform the functions that Congress would set down. And Congress would say we want this division of DOT, Civil Aeronautics Administration or whatever you want to call it, to be performing these functions and to be insulated.

I would like to pick up on a point——

Mr. MINETA. How about tenure in office? Does that insulate to any degree, besides the level at which the person is? Would it give a person more ability to resist political pressure?

Mr. HITCHCOCK. Yes, I think that is a very good suggestion. I could make an argument that realistically the only thing that separates the head of an independent agency from a Cabinet agency is the fact that one can be fired and the other cannot. I think that does help to provide some degree of insulation.

Let me, if I may, go back and pick up on another point you raised earlier, about the difference between executive versus independent. About 1 year ago, there was considerable controversy about actions of EPA that were being done allegedly for political favoritism, one way or the other. That did tend to have something of a controversial effect, not only the people who are involved in the solid waste area, but also the Administrator and ultimately the White House, on EPA was within the executive branch.

I do not want to particularly debate the merits one way or the other, but I think that experience shows that there is visibility on these issues, if they are within the executive branch, if there are abuses or tilting one way or the other, rather than if it is an independent agency. You get a greater degree of accountability because a decision ultimately reflects on the President or the Secretary more than if decisions are made by an independent agency, and the President can say—or the Secretary can say, "They are an independent agency. I have got nothing to do with that."

There are countervailing considerationsn there.

Mr. MINETA. Another type of insulation used in regulatory agencies is to have a collegial body. It would seem to me that this diminishes the possibility of improper influences by requiring that more than one person vote for a particular result. Would you agree that it is helpful to have a multimember body deciding cases? And if so, do you think it would be a good idea for DOT to have a panel of more than one official responsible for deciding such cases?

Mr. HITCHCOCK. That would be a useful option to consider as well. I think one of the proposals—it might have been Chairman McKinnon's proposal a while back—to have a three person commission consider it. I do not know if I can say who should be the three officials, but that is one option to deal with these areas.

One factor to be added. We are dealing not just with the problem of international carrier selection, but other problems such as essential air service and other issues. We're focusing on the international, but

that is the high visibility issue, but as you are aware, these issues crop up elsewhere as well.

Mr. MINETA. I understand your position, but I would like to clarify it for the record. In the DOT sunset plan, they attempt to limit the role of the Secretary of Transportation and the Assistant Secretary for Policy in deciding international route cases. The Assistant Secretary or Secretary could not issue a new decision in these cases, but could only approve the decision of the senior career official or remand the decision.

Thus, it would seem that DOT itself recognizes that there are insulation problems with having the Secretary of Transportation or the Assistant Secretary playing too active of a role in making decisions of carrier selection, in other cases. Would you agree that it is not desireable to give high ranking officials, such as the Secretary or Assistant Secretary, full powers of decision in aviation cases which are to be decided on an evidentiary record?

Mr. HITCHCOCK. Yes, I would agree. I think the proposal by DOT for a limited remand is useful. You also have the possibility that if the Administrator or the Assistant Secretary happens to tilt one way or the other—and there is a risk there—the idea of a limited remand might be helpful, as well as having a down side.

Mr. MINETA. Mr. Hammerschmidt?

Mr. HAMMERSCHMIDT. Thank you, Mr. Chairman. Thank you, Mr. Hitchcock, for your excellent testimony.

Your testimony indicates that a carrier's financial and managerial background should be an important factor in deciding whether to issue a certificate. You express some concern about the FAA's ability to assure that these matters are thoroughly investigated. In light of your concerns do you believe that we should preserve the current procedures that CAB employs, for determing domestic carrier fitness?

Mr. HITCHCOCK. I think it would be useful to maintain. Chairman McKinnon commented on some concerns yesterday. If you take an existing FAA staff and you say you've got to look at some other factors in addition to what you normally look at, as a realistic matter you're not going to get that kind of close scrutiny.

There might be opportunities to do something less than a full-blown evidentiary hearing, in some cases, but certainly we're not advocating a system that would threaten to go on for years and threaten to use economic fitness as a means for keeping new entrants out, as it was prior to deregulation. But it does provide useful checks on those types of questions.

Mr. HAMMERSCHMIDT. If they just use their present personnel, using the air carrier safety inspectors to make a decision on financial fitness, the expertise probably just is not there, in the present framework?

Mr. HITCHCOCK. Exactly. FAA now looks to see whether a carrier is in compliance with FAA rules and does not necessarily look at the sort of things the Board looks at. That is the problem. As you are aware, when you give new responsibilities to an agency which has existing responsibilities and is used to doing business in a particular way, it may be difficult to fully integrate them into the process.

Mr. HAMMERSCHMIDT. As part of the DOT sunset plan, the Secretary has proposed to establish a new Office of Consumer Affairs to re-

ceive and respond to airline consumer complaints and questions. Although it is anticipated that the majority of complaints, whether they be telephone calls or mail complaints, can be handled routinely, I would be interested in your opinion as to whether such an office would be accessible enough to consumers and would be responsive to their needs?

Mr. HITCHCOCK. I think there are ways of handling it, for example, if there is an 800 number, or there are active efforts to let the public know that there is someone who can help. The CAB has performed this function historically. And sometimes, depending on who is running the office, they do make efforts to reach out and talk to local newspapers and let people know that there is someone who can provide them help.

We try to do that ourselves, in a more limited fashion.

Oftentimes, what struck me in the years of working this area, is that people often just do not know what their rights are and they don't know how to enforce them. Obviously, just having a single office in Washington may not be the answer, but oftentimes when people know exactly what they can and cannot do, that helps to provide a direction that they can go in.

Mr. HAMMERSCHMIDT. Mr. Flynn, who testified yesterday, has proposed that carrier selection cases for international routes be decided by a panel of three individuals, appointed by the Secretary. This would totally remove the Secretary from any decisionmaking authority in this area. I wonder if you would comment on that proposal?

Mr. HITCHCOCK. As long as you maintain the possibility of some higher level check, I'm not sure it really matters whether the Secretary makes the decision or if it goes under the 801 program for international considerations by the President.

I am not sure, when you get above the position of Assistant Secretary or modal administrator, you can really say that there should not be the possibility of review. The Secretary is in charge of the Department and ultimately has responsibility.

If you want to limit it to limited remand, as DOT proposed, to be used in exceptional cases, that I think probably strikes the balance the best.

Mr. HAMMERSCHMIDT. In DOT's sunset plan, they have proposed a different plan for essential air service cases, as opposed to carrier selection for international routes and other functions. In the latter case the Secretary, as you know, or the Assistant Secretary for Policy in International Affairs, has the authority only to remand the case to the senior career official in the Assistant Secretary's office.

However, in EAS cases, decisions reached within the Office of EAS can be reversed outright by the Assistant Secretary or Secretary. Obviously DOT feels that the decisionmaking function in the area of international route awards should be more insulated than the EAS function. Do you agree?

Mr. HITCHCOCK. I'm not sure you should say one should be more insulated than the other. I think the better way of handling the essential air service program is to have decisions made by the administrative law judge and appeal them up to a modal administrator the same way the international aviation would be. That is similar to what the CAB does now.

I think it is part of the problem we mentioned in the testimony. You are scattering the functions around and creating different ways of deciding matters. The current system seems to have worked tolerably well. It might be most efficient to continue it within DOT, as opposed to splitting things within the agency.

Mr. HAMMERSCHMIDT. Yesterday, the CAB indicated its position on making permanent the temporary certificates awarded in certain international route cases. Do you have an opinion on that issue?

Mr. HITCHCOCK. Yes; as I recall, when we testified at your early sunset hearings 3 years ago, we testified against permanent licenses. There is some utility in maintaining some kind of check on carriers not providing adequate service, and having renewable certificates does perhaps provide some incentive in that area, rather than saying to a carrier we will give you this monopoly, and you can have it on a permanent basis.

So yes, we would favor some kind of check, a 5-year renewal or something of that nature, rather than permanent licensing.

Mr. HAMMERSCHMIDT. The 5 years now is a policy. It used to be 3 years. Now it's 5 years.

Mr. HITCHCOCK. When you're giving away very valuable rights, you want to make sure that the winning party remembers that it does have obligations and not to rest too comfortably by knowing that it has permanent monopoly, in effect, duopoly. That is why some check is useful in that area.

Mr. HAMMERSCHMIDT. Thank you.

Mr. MINETA. Mr. Oberstar.

Mr. OBERSTAR. Thank you, Mr. Chairman.

Mr. Hitchcock, you have discussed important features of the post-CAB era, which we are about to enter. You place a good deal more trust in the Office of Consumer Affairs, to be established by the department, than I would at this stage.

I do not like to be in a position of waiting and seeing, because according to the chart presented in the Secretary's testimony yesterday, fragmenting of functions—to which you have referred—would occur to undercut the effectiveness of that Office of Consumer Affairs. Important functions delegated off to Office of Inspector General, Office of General Counsel.

We heard yesterday about an interagency agreement between DOT and the Federal Trade Commission. A traveler has a complaint, which ultimately reaches the department level. That person is going to be shunted off to another agency by referring to the memorandum of understanding. What is your response?

Mr. HITCHCOCK. I agree, essentially, and that is one of the reasons why we have a problem with the notion of splitting up the functions all over DOT. The thrust of the testimony is keep everything under one roof within DOT and keep the Consumer Affairs Office in there, as part of that function.

What you have touched on, also, is the question of consumer protection regulations and enforcement of them, which I was going to discuss at the next round of hearings, but that does play into it, whether DOT is going to administer the consumer protection functions that the CAB now has, some of which may go to DOT or the FTC or whatever. That is still something of an open issue.

There is something to be said for putting it all in one office and keeping it all together. I agree with you. And that is why we have said, rather than spreading all of these parts all over DOT, keep the regulatory consumer protection assistance functions under one roof there.

Mr. OBERSTAR. If you believe that strongly, those of us who showed that concern would appreciate the support vocally, to the public, about the issue.

You addressed, at the bottom of page 5 here, the question of fitness. Do you believe it is good public policy to have the same agency determine both financial and managerial fitness, as well as technical fitness? That is, the safety functions and certifications, airworthiness, and all of the rest that goes along with safety functions of fitness?

Mr. HITCHCOCK. That was our concern with the DOT plan. I believe what they were talking about was trying to superimpose the managerial and financial fitness consideration on top of existing safety. Our concern is that they will get lost in the shuffle because FAA officials now know just to look for safety issues. They have not any experience in looking for these other issues, and it would get shunted aside, which is why we suggest that since DOT is picking up the residual responsibilities, they might be kept in a separate branch of DOT, or be considered by a separate office, at least.

The concern is that the bureaucracy now exists for safety certification. If you just say, "Now you're going to have to do something else on top of it," it could get lost in the shuffle. I agree with the point you are making. It ought to be considered a somewhat separate context, instead of telling the existing staff by the way, look at these other issues, too.

Mr. OBERSTAR. Doesn't the Department of Transportation have a responsibility to stand between the consuming public and the operating entity to insure the public interest? And that Government agency should not only assure that an airline is run safely, but it is in the public interest. That goes to the questions of financial fitness.

And the view, discussed yesterday by the Secretary, is that we will leave that to market forces. Do you feel comfortable with that viewpoint?

Mr. HITCHCOCK. No; that is why we suggested, in testimony, that there be consideration of these issues as well. Safety is principally what DOT tends to be about, and these issues do impinge on it. On the one hand, we want to make sure that it does not operate as a barrier to entry that keeps qualified companies out of the market. It can be applied in too heavyhanded a manner, as the Board did for a number of years. And that led to demand by many for more competition.

But at the same time, it is a fact that ought to be considered, as the Board is now doing.

Mr. OBERSTAR. If both safety fitness and financial and managerial fitness should not be handled in the FAA, then where should financial and managerial fitness be taken into consideration?

Mr. HITCHCOCK. I think it can be done in the same manner that is now done by the Board. We are saying that Congress has decided what areas are not going to be regulated. Let's take the areas where there still is going to be regulation and put them in one modal administration withinn DOT, which is the way the rest of the Department is organized and have a single administrator in charge.

And you can continue in that manner. There are probably efficiencies in doing that, rather than the DOT plan of sprinkling existing functions all over the department, which I think Congressman Hammerschmidt's question indicated, created different ways of doing business. You have got an established plan, established function, now in effect for these residual functions. That might be the best way of handling it.

Mr. OBERSTAR. May I rephrase your answer? You would say that the FAA should not be given the responsibility for financial and managerial fitness, that such responsibility should be lodged in departmental agencies, or the departmental entity that would include other aspects of consumer concerns?

Mr. HITCHCOCK. Our position basically is take what you have now and put it in a modal administration and let it operate that way. I'm not sure I want to close the door. At some time in the future, if it looks like it could be integrated in a particular way.

But I think that can wait. First of all, get it established within DOT and see how it works there. And then see where you go from there.

Mr. OBERSTAR. Separate the operating fitness of a carrier from the financial managerial questions, which are of a very different nature.

Mr. HITCHCOCK. I think what I am saying is slightly different. You cannot really separate out, entirely, managerial fitness from safety fitness. If people are not sound managers, they may not be sound operators either. I'm not saying we would say create a totally separate wall, especially if it would cause more problems.

If there was some indication that FAA could handle this, through a separate office at FAA and not through existing personnel who know how to do their job, that is one option. The real concern is that you currently have FAA personnel who are trained in safety certification. That is what they know how to do. They know how to track FAA regulations and look at that.

You have other CAB personnel who look at the financial and managerial. If you just say to the safety people all right now, you have to look at these other factors too, they are not going to get—they are going to get short shrift. They're not going to get fully considered, agencies being the way they are.

That is why you have got a current system in effect. It might be better to transfer it intact and see what happens with experience.

Mr. OBERSTAR. I'm going to put you in a position of a person living in rural Minnesota a long drive from Minneapolis-St. Paul, in a place which used to have trunk carrier service and lost it in the deregulated environment. The community has had a succession of commuters. People finally gave up. It is more reliable to jump in your car to drive, long though it may be, to Minneapolis-St. Paul, then to catch a flight to your ultimate destination. Isn't there a responsibility somewhere to look at the financial fitness of a carrier, to serve an area and to be durable in that service? Isn't somewhere on the part of the Government the responsibility to protect the consuming public?

Mr. HITCHCOCK. Yes, the proper running of the essential air service program is a very important factor of what DOT will be doing. It has been an important part of the CAB's work. Those are precisely the questions that ought to be asked. And the people in those communi-

ties of Worthington, Minn., and elsewhere ought to get satisfactory solutions.

We supported the program strongly and believe that there is an obligation of Government to carry that out.

Mr. OBERSTAR. The capacity to perform that task has existed within the CAB. Shouldn't that be carried over intact and not lodged with the FAA?

Mr. HITCHCOCK. Yes. The DOT plan has been to create a new office of essential air service within the Office of the Secretary. The first part of what we are saying is take what you're going to have after December 31, 1984, and put it within DOT under a single administrator, which is the way the rest of DOT is run. And there maybe are some things that you could fold into existing offices, some of the economic analysis for example, or some of the international negotiations.

Maybe there is some overlap there that you can take care of. But otherwise, keep the function operating in that manner.

Mr. OBERSTAR. Thank you.

Mr. MINETA. Mr. Packard?

Mr. PACKARD. Thank you.

I appreciate your testimony, Mr. Hitchcock. In discussing the carrier selection process for your international routes, you appear to be troubled more by the possibility that improper communications would take place between the various DOT offices than you are about the possibility of political pressures on the senior officers, and that this would affect their decisionmaking process.

Does that reflect pretty accurately what your testimony reflects?

Mr. HITCHCOCK. We are concerned about both. I did not mean to slight one over the other, but focused on one, in the interest of brevity, in the written testimony.

Mr. PACKARD. Are you satisfied with the process proposed by DOT in this area?

Mr. HITCHCOCK. Not fully, for several reasons. In the first place, I'm not certain that we understand how the Assistant Secretary or the Secretary is really going to engage in the review process.

Second, the problem is we are not sure about what I call the conduit problem. Efforts may be made to contact other officials in DOT, who then talk to the Secretary, to the Assistant Secretary. The DOT plan is not clear, to what extent are these people supposed to be insulated as well or protected, put in a situation where they are not able to make communications.

You have that now in the CAB rules, because you do have a separate agency and you put it under one roof, and you tend to draw the line and let people know who you can and who you cannot talk to. People would know that you cannot talk to people who are in this particular administration because they may be involved in the decisionmaking, you cannot talk to the Secretary or people in the Office of the Secretary who may have a role in this.

If anyone does try to influence them, you have to go through the separation of functions and the ex parte rules.

Mr. PACKARD. In your judgment, do you feel that DOT will be able to render the same level of service as the CAB has with the transfer of personnel? Do you think they will need additional personnel or can

they possibly reduce personnel to perform the same level of service?

Mr. HITCHCOCK. It is really hard for me to say. As I suggested, there may be some of the nonregulatory functions, you know, some of the international area, or some of the economic analysis that might be folded in. I just am not sure enough where the overlap is, if there is any.

The DOT testimony, the CAB testimony was not terribly helpful on that and they are really in the best position. I think it is something to take a look at. Once you see, when you have all of the bodies over at DOT, where the overlap is, if there is any.

Mr. PACKARD. That's all I have, Mr. Chairman.

Mr. MINETA. Any further questions from members or the staff?

[No response.]

Mr. MINETA. Mr. Hitchcock, thank you very much for your testimony before the subcommittee. We appreciate it.

Mr. HITCHCOCK. Thank you, Mr. Chairman.

Mr. MINETA. The subcommittee will now recess.

[Whereupon, at 11:05 a.m., the subcommittee recessed.]

[The following additional item was received for the record:]

AMERICAN HEALTH EDUCATION FOUNDATION,
Washington, D.C., February 17, 1984.

Hon. NORMAN Y. MINETA,
Chairman, Aviation Subcommittee, U.S. Congress,
Washington, D.C.

DEAR CONGRESSMAN MINETA: We humbly request, please, the honor and privilege to relate a recent incident, regarding the issue of restricting smoking aboard airplanes.

I recently returned from California on a popular airline. While the flight attendants were busy with food preparations, I took the "seventh inning stretch" and walked down the aisle. I noticed a gentleman in the second row was asleep and a burning cigarette was dangling from his mouth. I nudged his shoulder and he was startled. He was unaware that he had fallen asleep.

I immediately summoned the stewardess and I returned to my seat.

Thank you sincerely.

Respectfully submitted.

GERTRUDE ENGEL.

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